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ABSTRACT

This document begins with a brief historical survey of the practice of teacher certification in the United States. PBTE (Performance-Based Teacher Education) as a device in teacher certification, particularly in New York, is also considered as well as inservice evaluation as practiced in New York State. The conclusions that emerge from these discussions are as follows: (a) the present requirements for teacher education and credentialling are intolerable; (b) PBTE is an untested and problematic reform approach which ignores both the need to reorient teacher preparation toward local requirements and the vital inservice evaluation component of the process; and (c) unless a new direction is taken, eligible teachers will continue to be trained in an irrelevant mode, many bad teachers will continue to be hired, and many good teachers will be deterred or dismissed. It is recommended for the present that local school boards be granted the authority to hire any college graduate with relevant subject matter preparation and be required to seriously and systematically assess his performance once he is on the job. (JA)

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"TEACHER CREDENTIALLING REFORM IN NEW YORK STATE: A CRITIQUE AND A SUGGESTION FOR NEW DIRECTIONS"

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A CRITIQUE AND A SUGGESTION FOR NEW DIRECTIONS"*

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I - THE NATURE OF THE PROBLEM

In every state of the Union, persons wishing to teach in the public schools must be certified according to specific statutory and regulatory standards.[1] These standards are imposed in order to insure that "only qualified persons may engage systematically in the formal schooling of young people".[2] The Courts have generally strictly enforced certification rules because of a judicial assumption that "The provisions were intended to protect and promote the efficiency and educational influence of the public schools. They affect or concern public interest and obedience to them is an absolute and positive duty". Stetson v. Board of Education of the City of New York 218 N.Y. 301, 309 (1916).

But the actual impact of teacher credentialling laws, unfortunately, falls far short of the ideal. Joseph Featherstone summarized in blunt and direct language a widely-shared view when he wrote:

> "Most good teachers, most thoughtful students in education schools, and a growing number of laymen are aware that present certification practices are absurd. They don't protect children from incompetent and unfit teachers and administrators; they don't guarantee a decent level of teaching; they fail to provide incentives to good teachers and administrators; and they keep lots of people out of the schools who might do a better job than some of the professionals".[3]

In order to understand why state laws which were intended to promote high quality teaching in the public schools have in fact resulted in mediocrity, it is necessary to briefly trace the history and the role of the teacher training institution in the American educational system.[4] In the early nineteenth century, at the dawn of the era of universal public education, the few existing state credentialling laws sought only to insure that teachers were qualified, as Abraham Lincoln once put it, in "readin', writin' and cipherin' to the Rule of Three".[5] With the spread of universal public education, a need arose for massive numbers of elementary school teachers. These teachers, usually women with eighth grade education, began to emerge from a newly-established type of teacher training institution, the normal school. In a short course varying from six weeks to two years, these schools attempted to convey basic skills and pedagogical "bags of tricks" for teaching the three "R's" to young children. The teaching staffs of the more elitist secondary schools were, by way of contrast, largely filled by men who were trained at the college level and whose preparation centered on classical liberal arts disciplines, rather than on pedagogical techniques.

The accelerating spread of mass public education in the late nineteenth century coincided with the growth of the

popular university inspired by the Morrill Act. The increasing scale of public education and the complexity of problems faced by teachers of diverse urban populations sparked a movement toward upgrading of teacher education. The result was an expansion of the normal schools into teacher colleges or their merger into state universities where scholarly attention could be devoted to the "science" of pedagogy. Despite the optimistic expectations of John Dewey and other reformers, however, the effective merger of traditional university disciplines and teacher training functions never took place. Teacher candidates, now expected to hold college degrees, took general education courses which were unrelated to their "professional" studies; the faculties descending from the former normal schools continued a somewhat encapsulated existence, training elementary, and now often secondary - school teachers in "pedagogical methods" and educational theories which were not cross-fertilized with the disciplines of the academic departments.

Along with the "upgrading" of teacher education practices, came resultant changes in the credentialling regulations adopted by state education departments. Although in the nineteenth century, government agencies could, with little problem, examine the reading and writing skills of prospective

teachers, certification of the general education and methodological knowledge expected of teachers in the twentieth century was a much more formidable task. It became almost necessary to leave the basic duty for assessing mastery of these more complex academic skills to those responsible for teaching them in the first place. Hence, credentialling laws in almost all states have come to rely on attainment of a college degree and completion of a specified number of "professional courses", or have largely turned credentialling over to the training institutions by automatically granting a certificate to graduates of their "approved programs". (A detailed analysis of current credentialling laws and regulations in the State of New York is set forth in "Appendix A", annexed hereto).

From this brief, simplified account of the history of teacher training in the United States, several salient conclusions emerge. First, it is clear that despite the upgrading to collegiate level, teacher training institutions and departments of education have always been the step-children of American higher education. Their funding has been inadequate and their faculties have traditionally been of "inferior educational quality".[6] Second, the failure to effectively merge "professional studies" with classical liberal arts disciplines has resulted in the proliferation of mindless "Mickey Mouse"[7] methods courses and in "the

basic fact that the intellectual impoverishment of the course work remains a major characteristic of the field".[8] Even the practice-teaching segment of the typical teacher training institution curriculum, seemingly its most relevant component, is at best inadequate, and at worst counter-productive: evaluation and criticism lack a vigorous conceptual base and innovation is often stifled by a pressure to conform to established practices.[9]

It can come as no surprise, then, that teacher training institutions characteristically fail to attract the most qualified talent. Albert Shanker, president of the United Federation of Teachers has acknowledged that "....a good many teachers on a national basis hardly manage to get out of teachers college after they were pushed out of every other institution".[10] The 1965 Coleman report found that with respect to ability and performance, "future teachers generally were surpassed by non-future teachers at both the freshman and senior levels in tests of non-verbal reasoning, mathematics, science and social studies".[11] Teacher training institution students have also been generally described as upwardly mobile, conservative individuals who are reluctant to change a system which gives them their best opportunity for personal advancement.[12]

A system which to a large extent attracts below-average

talent and then provides an inadequate educational program is not likely to result in high-caliber teaching performance. It is not surprising, therefore, that a number of recent studies have found that teachers certified under current standards perform no better - and in some cases actually perform worse - than non-certified laymen.[13] New York State's Commissioner of Education has himself acknowledged the archaic nature of the present system which can assure the public of nothing more than that a certified teacher "is not intellectually inadequate and that he has some presumed interest in teaching".[14]

In short, it can fairly be said that present certification standards, far from assuring that only the most competent individuals are licensed to teach, in fact promote mediocrity and discourage - or even prohibit - highly-qualified people from entering the field. Many dedicated individuals with a potential for creative teaching careers have simply refused to submit themselves to a meaningless or stifling "professional" education school experience. In the past, teacher shortages sometimes necessitated the creation of loopholes in the complex State regulations, loopholes which allowed some such creative individuals access to the classroom without traditional credentials (See Appendix "A", infra). But the present teacher surplus has limited the

utilization of these exceptions; unfortunately, this curtailment coincides with expanding pressures for educational accountability and demonstrable performance, especially in minority communities. The net result is an increasing perception that the system is intolerable; The validity of both the existing credentialling practices and the legal assumptions which underlie them are starkly being called into question.

II PBTE: THE PREVALENT REFORM APPROACH

The widely-acknowledged deficiencies of teacher education programs and the traditional teacher certification standards have, as might be expected, stimulated serious reform efforts throughout the United States. The most prevalent new approach is that of Performance Based Teacher Education ("PBTE"), a system that has been labelled "the most significant lever for educational reform since Sputnik".[15] The explosion of interest in PBTE was documented by a 1973 study which found that 17 states had already incorporated this new system into their laws and regulations, 14 states were actively studying PBTE and more than two-thirds of the colleges and universities surveyed had either adopted the new approach or were planning to revamp their educational programs in accordance with PBTE goals.[16]

What precisely is PBTE? As the name implies, the PBTE model focuses on effective teacher performance, (i.e. "output"), as a certification standard instead of the traditional listing of accumulated college credits, (i.e. "input"). The idea is that specific teaching skills (or "competencies"*) which are directly correlated to improved pupil learning in the classroom can be identified, and once identified, can become the core of the teacher training institution's curriculum. Graduates of teacher preparation programs would then be evaluated for certification purposes according to their individual abilities to demonstrate mastery of these specific, performance-validated "competencies". PBTE has been generally defined as:

> "A system of teacher education which has its specific purpose the development of specifically described knowledge, skills, and behaviors that will enable a teacher to meet performance criteria for classroom teaching. Presumably, each competency attained by the preservice teacher is related to student learning and can be assessed...."[17]

A more detailed and comprehensive definition classifies PBTE as any teacher education program having the following characteristics:

> " 1. Competencies (knowledge, skills, behaviors) to be demonstrated by the student which are:
>
> derived from explicit conceptions of teacher roles,
>
> stated so as to make possible assessment of a student's behavior in relation to specific competencies, and
>
> made public in advance."

*PBTE is also commonly referred to as "Competency Based Teacher Education" (CBTE) because of this emphasis on development of teaching "competencies".

" 2. Criteria to be employed in assessing competencies are:

based upon, and in harmony with specified competencies,

explicit in stating expected levels of mastery under specific conditions, and

made public in advance.

3. Assessment of the student's competency:

uses his performance as the primary source of evidence,

takes into account evidence of the student's knowledge relevant to planning for, analyzing, interpreting, or evaluating situations or behavior, and

strives for objectivity.

4. The student's rate of progress through the program is determined by demonstrated competency rather than by time or course completed.

5. The instructional program is intended to facilitate development and evaluation of the student's achievement of specified competencies.[18] "

In theory, PBTE is a revolutionary concept capable of overcoming the major deficiencies in traditional teacher certification approaches described in the preceding section. PBTE's challenging individualized instructional orientation could attract more highly capable teaching candidates; its demand for orienting teacher education programs around specific competencies might compel fundamental revampings of teacher training institution curricula; and, most importantly, the assurance that future teachers would be

trained and evaluated in terms of skills which are directly correlated to improved classroom performance would mean that for the first time possession of a teacher's certificate might actually be a true index of qualifications for the job.

Although an apparently ideal system in theory, the accelerating implementation of PBTE in actual practice has, however, brought forth a host of severe critics. The major issues raised, and the related responses of PBTE advocates, can be summarized as follows:[19]

1. Unavailability of Valid Performance Measures -

The major shortcoming of the current PBTE movement is that, as even its defenders almost universally concede, research techniques that could validly measure on-the-job performance competence simply do not exist; in other words, we are unable at the present time to identify specific teaching behaviors which are in fact directly correlated to improved student ability.[20] Critics of PBTE assert that it is irresponsible to totally revamp teacher education programs and certification standards without an adequate research base. They suggest that PBTE be tested through limited pilot projects over the next few years; until and

unless such projects develop sophisticated, validated performance measurement techniques, PBTE should not be instituted on a wide-spread, let alone a mandatory, basis.

Defenders counter by asserting that the only way that the necessary comprehensive research will actually be done is by establishing a system which will demand its achievement. In the meantime, they say, even without full performance validation, teacher preparation will be significantly strengthened by wide-spread implementation of PBTE: in contrast with the status quo, performance-oriented expectations will dominate, relevant competencies will be defined based upon the input of a wide range of individuals and groups and the goals and methods of teacher preparation programs will, for the first time, be specifically and publicly articulated.

2. Difficulties in the Definition of "Competencies" -

One of the reasons performance validation studies do not exist, according to critics, is that no one can really define the specific "competencies" sought to be measured. The difficulty of precise definition in this area has resulted in the articulation as "competencies" of vague, meaningless platitudes such as the "ability to use innovative teaching techniques".[21] Furthermore, at what level are these skills to be identified? Are we seeking to evaluate on the basis of discrete competencies such as the ability to "ask questions that require other than rote memory to answer them",[22]

a skill that is perhaps identifiable but is unlikely to ever, by itself, be validated in terms of measurable differences in student performance (in some circumstances, such as language drill, blind utilization of such a "competency" may in fact be counter-productive). Or, are we rather to look at the teacher's wider ability to utilize a variety of classroom discussion techniques that will foster creative thinking; this broader ability could encompass dozens of discrete competencies which become effective teaching techniques only when harmoniously orchestrated into an overall situational pattern.

In short, defining the appropriate "competencies" and relating "the part to the whole" present major problems for implementation of PBTE. PBTE advocates recognize the difficulty of the task. But they counter by asserting that their method of articulating competencies through a thorough process based on diverse input and systematic refinement leading eventually to full performance validation, is a substantial improvement over the unarticulated and untested generalities which comprise present teacher training curricula. They reason that only by making the parts explicit can any sense be made of the whole. Ultimately, the question of the specificity level of the discrete competencies will be resolved by discovering the precise level of teacher behavior which will have discernible effects on pupil achievement.

3. Behavioristic Orientation - Alleging that PBTE is nothing more than a resuscitation of a discredited Skinnerean approach to education, critics claim that the humanistic dimension of the educational process will be lost in the quest for discrete, measurable competency techniques. Teaching is an art, not a science, according to this view, and the ultimate values of education, such as the development of critical thinking, imagination, and ability to cope effectively with a changing world, can never be related to "performance - validated" techniques. Instead of raising the creative standards of the "profession", PBTE will thus turn most teachers into didactic technicians who merely carry out certain programmed directions.

Defenders of the system stress the fact that without basic abilities to read, write, etc., abilities which are not effectively being taught to millions of students today, emphasis on broader humanistic values rings hollow. In addition, they maintain that PBTE is not limited to evaluation of technical abilities. On the contrary, important humanitarian teacher attributes like ability to promote creative thinking and attitudinal rapport with students of diverse backgrounds are clarified and promoted through the PBTE method. In this way, PBTE is said to provide a sound base for effective, creative teaching.

4. Difficulties in Implementation - For PBTE to effectively revamp teacher education, all of a candidate's college training, and not merely the 10% to 20% of the curriculum typically devoted to "professional studies" must be remade in its mold. But to attempt to revamp the liberal arts departments of major universities in order to promote professional preparation of education students would of necessity, involve significant interference with the rights of liberal arts students and liberal arts faculty members. The original requirement in the 1972 "Texas Standards for Teacher Education" that general education programs be designed "to develop basic competencies required for a teacher" and that this coordinating task be the responsibility of the Dean of Education, provoked a major counter-reaction by liberal arts professors;[23] as a result, the Standards had to be revised and the Attorney General ultimately issued a legal opinion invalidating the mandatory implementation of PBTE in Texas.[24] PBTE defenders counter by arguing that ineffective integration of liberal arts and education programs has historically been a major failing of the university system in general and that PBTE presents an opportunity for the two groups, working together, to at last remedy this situation. It is also pointed out that the PBTE emphasis on individualized learning progress is the direction toward which many liberal arts departments are moving in any event.

Another significant practical problem facing PBTE advocates is the question of the costs involved. The Committee on National Program Priorities in Teacher Education estimates that the five-year cost of developing one PBTE model at regionally-based development centers could run from $59 million to $322 million.[25] Full implementation of diverse models at thousands of universities would obviously involve enormous additional costs beyond that figure. In a time of fiscal stringency in educational budgets, such sums may be hard to obtain. Colleges ordered by state education departments to implement PBTE in accordance with specified time tables claim that the states are unfairly asking them to assume much of this burden. Some state education officials counter by saying that imaginative use of teacher internships, freeing up regular teachers to work on PBTE development, and expanded use of self-instructional materials by students would significantly reduce these costs.

III PBTE IN NEW YORK STATE

New York's Board of Regents, like the Commissioner of Education, has explicitly acknowledged the serious failings and need for reform of the traditional teacher education

and credentialling system which they have established:

> "The [State Education] Department, like the colleges themselves, has been unable to determine how well preparatory programs are meeting the needs of the schools. In other words, no one has been able to state with assurance that the teachers who are certified can produce specified learning gains in the pupils they are to teach".[26]

State Education Department officials, after studying PBTE and its possibilities for several years, took their first definitive step toward implementation of the system in 1971 when in a document entitled "A New Style of Certification" they announced the establishment of 12 trial projects. These projects, in accordance with general "process standards" promulgated by the Department, would organize local consortia composed of representatives of institutions of higher education, public schools, teachers, and teacher education students to develop goals, competencies and evaluative methods leading to performance-based certification.

Although none of these pilot projects had yet advanced to the point where they had developed operational competencies, the Regents announced in 1972 a specific timetable and directional objectives for converting all teacher education programs and all certification standards in the State to a competency-oriented system by 1980.[27] All new teacher education programs submitted for state approval after

September 1,1973 have been required to meet the new competency-oriented standards and, in accordance with a schedule of staggered dates commencing in 1975, existing programs must be redesigned in this mold.[28] Thus, unlike states like California and New Jersey which have chosen to await development of competencies by state commissions or pilot projects, or states like Washington which permit PBTE as an alternative to traditional preparation approaches, New York became the second state, after Texas, to implement a mandatory PBTE system on a state-wide basis.

New York's rapid adoption of a PBTE approach should not however, be viewed as an indication of precipitate, wholesale conversion to untested PBTE dogmas. Analysis of the competency-based standards and directives issued to date indicate a subtle and sophisticated understanding of the weaknesses as well as the strengths of the PBTE movement. One almost has the impression that the drafters of these documents, being fully aware of all possible criticisms of PBTE, took pains to attempt to design a system that would parry each of them.

The basic thrust of New York's competency-based approach as set forth in the 1972 Regents' plan is to place the burden on teacher training programs, acting in conjunction with local consortia of school district personnel, teachers and

"other agencies" to revamp their curricula to meet the Regents' basic goal of establishing:

> "....a system of certification by which the State can assure the public that professional personnel in the schools possess and maintain demonstrated competence to enable children to learn".

Unlike state education agencies in some other jurisdictions, the New York Regents indicate no intention of developing state-wide competencies which colleges would be required to adopt;[29] in fact, the colleges are not even specifically directed to develop discrete performance-based competency standards, to modularize or systematize student learning programs, or to initiate specific new field-centered student teaching programs (compare, on all these points, the detailed requirements set forth in the 40-page "Texas Standards for Teacher Education and Certification" [June, 1972, revised October, 1973]).

Instead of mandating specific requirements, the Regents set forth a series of questions which the colleges must answer for initial approval and second-stage registration of their programs. Thus, initial approval will center on answers to these inquiries:

> "a. What competencies and attitudes should the student demonstrate at the completion of the program?
>
> b. What evidence will be acceptable to demonstrate that the competencies and attitudes desired have been achieved?
>
> c. What contribution to the teacher education program will be made by the university, the school district, the bargaining agent and others?

d. What steps are being taken to introduce the concept of demonstration of competencies in relevant components of the nonprofessional-education portion of teacher education programs?"

Once the program is operating, continued approval will focus on answers to these two questions:

"a. What evidence is available to demonstrate that graduates have achieved the desired competencies and attitudes?

b. What evidence is available to indicate that the desired competencies and attitudes are appropriate?"

The careful phrasing of these questions appears to be designed to avoid any possible criticism of strait-jacketing colleges into a narrow PBTE mold. For example, although the Regents' plan states as an "underlying conviction" that "pupil performance should be the underlying basis for judging teacher competence" and they include in their timetable an expectation that full performance validation techniques will be available by 1990, question "b" for continued approval asks merely for evidence that desired competencies are "appropriate", but not that they have been performance-validated. Such general phraseology would seem to give state education department officials the discretion to require performance validation information if future research techniques prove capable of providing it, or to fall back to accepting job relevancy information based on "tradition and logic" if it is not.

Similarly, analyzing the four initial approval questions, one notes that the generalized use of the term "competencies and attitudes" avoids the difficult problems of defining discrete competencies and relating the "part" to the "whole", as well as the touchy issue of whether all the humanitarian aspects of the teaching occupation or only certain technical behavioral portions must be revamped in the new mold. The relationship between the education and liberal arts faculties is also fudged by alluding only to "relevant components" of the general education program without defining which components will be considered relevant.

In short, the vague language used in each specific item, and indeed, the very use of the question format itself, seem carefully designed to avoid each of the PBTE criticisms described above in Section II of this paper. In fact, strictly speaking, one might conclude that New York is not, after all, implementing a mandatory PBTE system. The Regents actually state that although "Performance-based and field-centered teacher education is recognized as a most promising approach,....[v]ariations or alternatives which demonstrate achievement of the Regents goal and also reflect convictions underlying this goal, will also be carefully considered".

But what alternatives could conceivably meet the Regents' goal of maintaining "demonstrated competence to

enable children to learn"? The only way to assure "demonstrated competence", especially when the Regents' "convictions" require that "pupil performance should be the underlying basis for judging teacher competence", is through a credentialling system which is performance-based -- and that by definition means PBTE.

Thus, it would appear that if the Regents "competency-based" approach is to be seriously enforced, the vague generalities of the present standards at some point will need to be more precisely defined; and at that time the critical issues raised by PBTE detractors will have to be faced.[30] Although no new teacher college programs have attempted to register since the new rules became effective on September 1,1973, stronger language utilized in the administrative directives issued subsequent to promulgation of the Regents' rules indicates that a clarification in a stricter PBTE direction may be in the offing.[31]

If, on the other hand, because of implementation problems and counter-pressures from affected interest groups, the new mandates are loosely interpreted, they may indeed prove only to have provided sophisticated terminology to "cast old wine into new bottles". One state education department official has stated that even if a real performance-based system is never achieved, the new program

will at least compel teacher colleges to re-examine their operations and to publicly articulate the goals and methods underlying the programs which they operate. One may well ask whether a mere clarification or public articulation of traditional goals and practices merits a total revision of the state's credentialling laws and subjection of colleges to significant additional expense, administrative entanglements and chilling uncertainties in future program planning.[32]

But whether the specifics of the Regents' plan are ultimately implemented in strict PBTE terms, or in a looser "goal articulation" manner, the inherent increased emphasis on "approved program" credentialling is likely to have a lasting, detrimental impact. The Regents have stated that by 1980, the State Education Department will cease accepting applications for certification from individual candidates; "all persons seeking certification must then be recommended for certification by registered preparatory programs".[33] The implication of this provision would appear to be that the few existing alternative certification routes and the liberal arts graduate's current ability to gain certification by taking random "professional courses" at various institutions (see Appendix A, infra) will be closed and the monopolistic control of teacher colleges over credentialling access will become complete.[34]

Assuming that thorough-going PBTE programs are effectively implemented, this requirement would seem logical: If PBTE can produce teachers with demonstrable, performance-validated competency, only those meeting standards set in such teacher education programs should be permitted to teach. But the serious questions posed by critics as to whether performance validation methods can ever be achieved raises the danger that all future teachers would be trained in "specific teacher behavior that in fact, is not positively linked to gains in student learning. If this occurred, such teacher behavior would be emphasized in training programs and thereafter would be difficult to change".[35] Rigidity and mandatory conformance with the "conventional wisdom" rather than creativity and demonstrable performance improvements would be the results.

Furthermore, even if full performance validation can be realized, it is by no means clear that centering credentialling in teacher training institutions can achieve the goal of assuring the "public that professional personnel in the schools possess and maintain demonstrated competence to enable children to learn". The implementation mechanisms in the Regents plan ignore the critical questions of who is the "public" and what are the children to "learn". PBTE is based on an assumption that competencies can be developed

which relate directly to learning needs and goals in the actual school setting. It is obvious that a demonstrable ability to teach certain classical humanities subjects to middle class students in Scarsdale (or for that matter, in Bayside, Queens), would be largely irrelevant to the principal and parents of a low reading score school in Harlem. The Regents consortium mechanism, however, contemplates groupings of local school districts under the umbrella of a regional university center for the ultimate purpose of awarding teaching credentials valid on a state-wide basis. Competencies emerging from such groupings must, of necessity, be overly-general in scope and often unrelated to specific local needs.[36] Furthermore, the fact that : "[m]any urban school districts, because they are often rated 'less desirable' by prospective teachers seem to have less influence than their suburban counterparts",[37] with teacher training institutions, means that the interests of minority communities, those in greatest need of demonstrable teacher competency, are likely to suffer most from the regional grouping approach.

State officials point out that once the new system is in operation, teacher colleges will be able to provide prospective school district employers with highly useful assessment indices of their graduates' specific competencies.

But the fact remains that under the Regents' plan, local districts will have no assurance that training in specific skills important to them will ever be received by any of these graduates. Moreover, the likelihood that entry to the profession will become increasingly selective on the basis of a potential to achieve mandated competencies[38] means that the pool of alternative talents from which a local district may draw its teachers will become increasingly narrowed. (And, it is apparent that minority group individuals, who are less likely to relate to the competencies established by the majority population, will be the greatest victims of such a selecting process).[39]

Thus, in whatever form New York's competency-based system is finally implemented, the ultimate outcome of the present reform approach may well be a vast increase in the power of teacher training institutions and the emergence of a more restrictive entry system, without any assurance that state credentialling in fact means qualification to effectively teach at the local school level.

IV - INSERVICE EVALUATION: THE NEGLECTED DIMENSION

Teachers appointed to positions in any school district in the State of New York are subject to a five-year

probationary evaluation period.[40] Ed Law secs. 2509, 2573, 3012, 3013. At the end of the probationary period, a teacher whose contract is renewed becomes tenured and is subject to removal only if found guilty of charges of incompetence, neglect of duty, etc. after a full due process hearing. Ed Law secs. 2590-j.7, 3020, 3020-a. The cumbersomeness of this procedure and difficulty of meeting the statutory burdens of proof have meant that in practice few tenured teachers are ever fired: in a recent five-year period only 12 of New York City's 60,000 teachers were dismissed under these procedures.[41]

The acknowledged failure of existing teacher preparation and credentialling standards to guarantee demonstrable competency, combined with the near impossibility of dismissing a teacher once tenure is achieved, render the five-year probationary period potentially the most meaningful opportunity for determining the ability of a teacher to perform in a classroom situation. More than any form of college-oriented, out-of-district training, probationary evaluation permits analysis of job requirements and measurement of competencies in a fully relevant setting. As the former president of the New York City Board of Education put it:

> "....this Board and the Chancellor....feel that the real examination process for teachers or for supervisors should be on the job, and that accountability for the performance during a probationary period is more important to insure quality of performance than any other method...."[42]

Unfortunately, however, it is widely conceded that the selection and training potential of the probationary period has been scarcely utilized.[43] Under these circumstances, one might have expected a major focus of the Regents' reform effort to center on buttressing probationary evaluation procedures. The 1972 master plan does recognize the importance of in-service education and talks of the possibility of establishing teacher centers and "light house" schools as proposed by the Fleischmann Commission.[44] But in comparison with the immediate, mandated timetables for implementation of competency-based teacher preparation, in-service reform is a matter that the Regents propose to "study" and "develop" over the next five years. The only specific committment in the plan is that all teachers certified after September 1,1980 (but apparently not incumbent teachers) will be subject to periodic performance re-certifications, presumably at the proposed regional centers. Even that committment has, however, been revoked because "it has been decided to hold that portion of the plan in abeyance for further study by the Department and the profession and to profit by experience of other professions as they work toward periodic relicensing or renewal plans".[45]

The inappropriateness of the Department's decision to

put the problems of in-service training and evaluation on the"back burner" becomes especially apparent when one recognizes the blatant inadequacies of present evaluation laws and regulations in the State and the likelihood that developing judicial doctrines may in any event shortly compel the State to concentrate more of its energies on reforming probationary evaluation procedures. An analysis of this developing legal situation will shed light on the serious inadequacies of the present probationary evaluation system and on possible directions for change.

A long-established principle of education law in New York State is that probationary teachers may be dismissed "at any time during such probationary period" by majority vote of the local school board upon the recommendation of the superintendent, without any hearing or explanation of reasons being given. Ed.Law secs. 2509, 2573, 3012, 3013. Furthermore, a teacher may be denied tenure and automatically dismissed at the end of his probationary period if he fails to obtain a recommendation of the superintendent.Ibid. Even if the superintendent recommends tenure, his decision may be overruled by the board of education, again with no hearing or statement of reasons being given. Board of Education of Chautauqua Central School District v. Teacher's Association 41 A.D.2d 47, 52 (4th Dep't.,1973). The Courts and the Commissioner of Education have repeatedly underscored the

untrammeled discretion of a school board to discontinue the services of a probationary teacher "without a hearing and without giving the reasons therefor" Pinto v. Wynstra 22 A.D. 2d 914, 915 (2d Dep't, 1964); See also, e.g. Butler v. Allen 29 A.D. 2d 799 (3rd Dep't, 1968), Matter of Albert 3 Ed. Dep't. Rep. 228 (1964).

New York's laws on this point are markedly more stringent than statutes in a number of other states, which provide for review proceedings prior to a denial of tenure (See e.g. Texas Ed. Code sec. 13.104, Calif. Ed. Code sec. 13443),[46] and even stronger hearing rights before a probationary teacher may suffer the severe stigma of a mid-semester dismissal (See e.g. Calif. Ed. Code sec. 13442, Fla. Stat. Ann. sec. 231.36, Texas Ed. Code sec. 13-109). The policy rationale for New York's strong stance on this point has been articulated by the Commissioner of Education as follows:

> "This broad grant of power to boards of education with respect to the employment of probationary teachers is intended to allow boards to evaluate fully all aspects of the teacher's record. This power exists for the protection of the educational interests of the children of the district since a teacher, once having been placed on tenure, can be dismissed only after a full trial of specific charges in limited categories. It is these educational interests which have led to the rule that a probationary teacher who is not granted tenure is entitled to neither a statement of charges nor a hearing". Matter of Collins 9 Dep't. Rep. 52 (1969).

This broad discretion might well be justifiable if the above-stated assumption that boards "evaluate fully all aspects of the teacher's record" were true in practice. But neither the legislature nor the Commissioner has seen fit to promulgate statutory or administrative requirements to ensure that a board's decision to hire or fire is based on an adequate evaluative record.[47] New York has no statutes similar to Rev. Code of Wash. Ann. sec. 28A, 67,065 which requires the establishment of local evaluative procedures (and a specific trial period for probationary teachers to improve allegedly unsatisfactory service before being subject to dismissal) or Purdon's Penna. Stat. Ann. Title 24 sec. 11-1123 which requires the establishment of state-wide evaluation systems, which must be adhered to by all local districts (Appeal of Sullivan Co. Joint School Board 189 A.2d 249 (1963).

Instead,the manner in which evaluations are to be conducted in New York is left to the discretion of each local board. Most of the boards have failed to take this responsibility seriously. One state education department official volunteered the generalization that goals and standards for evaluating teacher competence in school districts in New York State either "date from the 1920's or are totally undeveloped or irrelevant". Interviews with principals, superintendents and board members indicate

that evaluations are basically handled by one principal or assistant principal who is given virtual carte blanche authority to adjudge a teacher "satisfactory or unsatisfactory" on the basis of one or two classroom visits a term. This recommendation is then almost invariably accepted by the superintendent and passed on to the board.

The looseness of the few established evaluation guides mean that these school supervisors, who are not required to have special training or competence in personnel evaluation, subjectively determine a teacher's future: "They can make any teacher look good or bad, depending on how they slant the classroom observation notes". In most cases, school supervisors give uniform satisfactory ratings[48] in order to "avoid making waves" or to limit their own responsibility to train unsatisfactory teachers.[49] The few negative ratings which do emerge often appear to be based upon hostility or bias on the part of the supervisor rather than on real inadequacies as measured by objective criteria.[50]

The invalidity of the present probationary evaluation approach is exemplified by an analysis, on its face, of the form currently used by New York's central board of education (and, apparently by all of the community school boards,) for the reporting of teacher ratings. The form asks for "satisfactory" or "unsatisfactory" ratings and one or two

word additional commentary* in 24 separate areas of teacher performance. These performance categories include meaningless items such as "professional attitude", irrelevant items such as "attention to routine matters", and controversial items such as "control of class" which are overly vague without an indication of the disciplinary philosophy underlying them. The few potentially significant items such as "evidence of pupil growth in knowledge, skills, appreciations, and attitudes", again need further clarification of specific relevant standards (and more than an "S" or "U" designation) to intelligently describe a supervisor's findings. The rationale for these criteria, let alone their origin, is nowhere stated. Nor is any indication given as to whether one "U" in any category, one or more "U's" in important categories (according to whose definition?), an average "U" rating, or a uniform "U" rating is supposed to result in an overall unsatisfactory finding. In short, this form neither encourages nor requires other than subjective supervisory ratings.[51]

Relatively little attention was paid in years past to the clear inadequacy of existing evaluation procedures for the simple reason that relatively few teachers were seriously affected by them. But recent developments such as the state-wide cut-back in teacher positions and consequent

*Additional remarks and additional sheets can be attached, but this is not required.

competition for available jobs, and the development of a community school district system in the City of New York have resulted in a great increase in the number of "U" ratings and consequent teacher dismissals.[52] Accordingly, teacher unions, sensitive to the need to protect their members from arbitrary dismissals under inadequate or non-existent standards, have begun to insist upon "due process" hearing rights for probationary teachers in their contractual demands.[53] New York City's United Federation of Teachers, which had earlier won a guarantee of a superintendent's "review" of "U" ratings or dismissal notices as described in Bd. of Ed. By-laws sec. 105-a, is now pressing further for expansion of this proceeding into a full trial-type hearing replete with right to counsel (See, e.g. Matter of Clausen 39 A.D. 2d 708 (2d Dep't, 1972), Matter of Brown 42 A.D.2d 702 (2d Dep't, 1973). Upstate districts were required by the legislature, beginning in 1972, to supply probationary teachers, upon request, with a written statement of reasons for a recommended dismissal, although a right to a hearing to rebut such reasons still is not afforded. Ed. Law sec. 3031.[54]

The trend toward expansion of probationary teacher hearing rights has accelerated during the past year as a result of the United States Supreme Court's ruling in Board of Regents v. Roth 408 U.S. 564 (1972). Although the

factual settings in that case concerned a college instructor whose one-year contract was not renewed, the general standards enunciated have been applied at the elementary and secondary level as well. Briefly stated, the Roth ruling appears to stand for the proposition that a probationary teacher's constitutional right to the "liberty" to pursue his profession and consequently to a hearing prior to dismissal, will obtain where his "reputation or integrity" is at stake or where a "stigma" or other disability foreclosing the "freedom to take advantage of other employment opportunities" will result.[55]

Although the lower Court interpretations of Roth have been mixed, and often contradictory, up to this point,[56] it would appear that the Roth case, when finally clarified, could result in a right to a hearing for virtually every New York probationary teacher threatened with dismissal. Such dismissals obviously cast a negative aspersion on a teacher's reputation, especially when no opportunity is given to clear his name. Furthermore, "foreclosure of future employment opportunities" could generally be shown since a potential future employer who sees unrebutted charges (or a dismissal based on no charges) in an applicant's record must assume that incompetence rather than personality clashes or differences in educational philosophy prompted the dismissal.[57]

As the Courts become increasingly involved in probationary dismissal cases, attention is likely to shift from procedural hearing rights to substantive considerations of what standards are in fact being used to deny citizens of employment opportunities.[58] It is clear that existing evaluative criteria and procedures cannot withstand rigid judicial scrutiny. Therefore, consistent with the legal trends described in more detail in Appendix "B", it is possible that most current evaluation approaches will be held to be "arbitrary and capricious" and invalid as a matter of law. The end result of this process could be that almost no teachers will be subject to dismissal until such time as rational evaluation standards and procedures are developed. At that point, the local school districts and the State Education Department, in order to retain managerial flexibility, will be forced to reform the evaluation procedures on an immediate crash basis. Clearly, a better course would be to begin moving in this direction at the present time as a matter of the highest priority.

V A SUGGESTION FOR NEW DIRECTIONS

The general conclusions which emerge from the discussion in the preceding sections are apparent: the present

requirements for teacher education and credentialling are intolerable; PBTE is an untested and problematic reform approach which ignores both the need to reorient teacher preparation toward local requirements and the vital in-service evaluation component of the process. Unless a new direction is taken, eligible teachers will continue to be trained in an irrelevant mode, many bad teachers will continue to be hired and many good teachers will be deterred or dismissed,[59] and the state's obligation and commitment to provide quality education for students of all abilities and backgrounds will remain tragically far from fulfillment.

From these inescapable conclusions, some specific directions for teacher hiring practices over the next decade also directly emerge. If teacher training institutions cannot assure demonstrable competency in their graduates, why continue their monopoly over access to the profession? If teacher credentialling laws are presently incapable of guaranteeing quality personnel, why keep them on the books? If present practices unreasonably limit the supply of high-caliber instructors, why not remove the barriers and widen the pool of available talent? If performance standards and performance evaluation can best be accomplished at the local level, why continue a regional or state-wide orientation?

In short, the logical legal direction, until such time as PBTE or other currently unproven reforms can provide reliable, pre-service competency indicia, would be to grant local school boards the authority to hire any college graduate [60] with relevant subject matter preparation* and to require such districts to seriously and systematically assess his performance once he is on the job.

This proposed new approach, in one sense, is no more than a return to basic principles. The state would fulfill the original purpose of teacher credentialling laws in guaranteeing that teachers do not lack knowledge of the subject area they purport to teach,[61] but would abandon, at least temporarily, the more recent and elusive quest to attest in advance to a teacher's instructional abilities. The contemporary teacher's dossier of completed "professional courses" provides a veneer of certified, paper "competence" which allows and encourages local districts to make mechanical hiring decisions and then to consider their assessment responsibilities ended once 30 graduate credits have been added to the resume.[62] But if legal prohibitions against hiring alternative talent are eliminated, and if administrators and teachers alike can no longer hide behind

* or any person with equivalent proficiency

paper certification shields, parents, students and the entire community will undoubtedly demand greater accountability for teacher hiring decisions. At that point, on-the-job performance evaluation will, of necessity, become a serious high priority undertaking in every school district.

Somewhat paradoxically, elimination of their monopoly status is likely in the long run to be the most effective tonic for the strengthening of teacher education institutions. Lacking the protection of a state "approved-program" umbrella, the colleges will be compelled to justify their existence by proving to local school districts that training received by their graduates will result in superior teaching performance. Their incentive to fully support and effectively develop the potential of PBTE or other reform approaches (which is almost nil at the present time) will become real. Pending full development of PBTE or other alternatives, these institutions are not likely, of course, to go out of business. Their existing rapport with public school personnel, and the continuing advantage their graduates will retain in being able to present a detailed transcript and prior student teaching experience* for analysis by prospective employers, will give them an employment edge - but no longer an employment right - over other would-be applicants.

*Outstanding B.A. generalists may, at times, be hired without any student teaching experience under the proposed approach. But in most such cases, local districts would undoubtedly require some prior classroom exposure, as for instance, through practice teaching in a summer session preceding their employment. See, e.g. Calif. Ed. Code sec. 13200.5.

The proposal presented here is not fully new. A number of educational reformers, especially in the post-Sputnik demand for improved subject matter competency, have long called for certification of B.A. generalists.[63] The State of California presently permits local districts to hire B.A. generalists, although the experiment entails special examinations and is limited to 200 such hirings per year. (Calif. Ed. Code sec. 13200). What had been overlooked in most of these past suggestions, however, was the importance of revitalizing on-the-job evaluation techniques; widening the teacher applicant pool should be seen not as an end in itself, but rather as a means to promote clarification of performance goals and performance measures. From one perspective, it might even be said that the present proposals amount, in effect, to a call for a different and more effective method of testing the potential of PBTE. By their very nature, performance evaluation techniques must originate at the local level,and local school districts would have the greatest motivation to make the new system work. In the end, then, the present proposal could well result in more vigorous professional preparation prerequisites - but only if such requirements have been fully validated for particular school settings.

Preliminary discussion with a number of educators of the proposed new approach has elicited two major objections.

The first is that opening teacher jobs to any college graduate or person with equivalent credentials would lower the "professional status" of the teaching occupation. "Lawyers and doctors are credentialled before being permitted to practice, and so, similarly, should be teachers".[64] Leaving aside the question of whether present credentialling standards for lawyers and doctors are themselves in need of significant reform, the basic answer to this objection is that medicine and law are totally different types of callings. A doctor can be tested for his understanding of scientific concepts and perhaps, for his demonstration of objective medical techniques. A lawyer can be expected to show knowledge of substantive legal concepts and evidence of legal analytic ability.[65] In both these areas, the expected competencies are clearly understood, readily demonstrable and are not subject to variation for the differing needs of particular client groups. Moreover, in point of fact, future lawyers and doctors are examined by medical boards and bar examiners for basic "subject matter" competency and not for their bedside manner or ability to convey their knowledge to their clients.[66] Thus, the lawyer-doctor analogy argues more for the subject-matter knowledge entry requirement being proposed here than for continuation of the ineffectual"instructional abilities" credentialling of the status quo.[67]

The second, and more significant, objection to the proposed new approach is that widening access to the classroom and placing basic responsibility for teacher selection at the local school district level will permit total "subjectivity" in hiring. This fear of "subjectivity" is sometimes stated in terms of a general abandonment of merit hiring, but more often the specific problem stated is that ethnic minorities will either be favored,[68] or disfavored,[69] by such an approach. The easy answer to such objections is that since present credentialling requirements are based upon non-validated and irrelevant standards, one can hardly argue against proposed changes which may unfairly eliminate some qualified candidates by defending a status quo which already does irrationally exclude many others.

But the more important retort to this line of argument is that there is no reason to conclude that the flexibility and local discretion inherent in the proposed changes must degenerate into subjective favoritism in hiring practices. State regulations can be enacted which would require local districts to articulate the goals and specific performance competencies against which teachers will be evaluated; these standards would then be subject to overall state monitoring.[70] An additional critical component of such state regulations would be articulation of "process standards"

specifying the types of procedures to be implemented by each district and the composition of the groups having input into both the initial articulation of performance standards and the actual on-the-job evaluation.

Those who fear subjectivity in local performance evaluations apparently assume that the prevalent practice of delegation to one individual of the actual responsibility for evaluating performance will continue. It can hardly be denied that such single perspective evaluations carry inherent dangers of subjectivity and abuse.[71] The obvious mechanism for minimizing subjectivity without sacrificing necessary local district discretion would be to require that a wide consortium of board members, administrators, teachers, parents, students and community groups fully participate (and not merely "consult") in all aspects of the process - i.e. performance standard articulation and performance evaluation. In addition to broadening the evaluative perspectives and assuring objectivity, such a consortium approach would also directly promote in-service diagnosis and improvement of teaching skills. Supervisors would be viewed by fledgling teachers as helpful advisors, rather than as adversary "raters";[72] teachers would also be more likely to admit and attempt to correct deficiencies in their performance if they knew that evaluations would be conducted, after a reasonable diagnostic period, by a fair

and impartial panel, which fully considered the peer evaluations of their teaching colleagues.

Important steps in the direction of widening the range of significant input by all interested parties and experimenting with possible performance evaluation procedures have already been taken, among others, by the New York State Education Department,[73] the New York City school system responding to a court order calling for the creation of a new system for licensing of supervisors,[74] and the California legislature in enacting the controversial Stull Law in 1971;[75] these efforts demonstrate that the proposed approach is workable, even though in each of these cases, the scope and the validity of the experiment has been limited by either excessive curtailment of local authority or unnecessary retention of elements of the traditional credentialling requirements.

What is clearly called for is an uncompromising commitment to this new direction. Because of its recognition of the pressing need for reform of current credentialling inadequacies, the New York State Education Department has determined to mandate a timetable for implementation of untested and problematic PBTE approaches. Gambling on PBTE may be a necessary risk if no alternatives are available. The preceding pages of this paper have been written in an effort to show that a viable alternative

more worthy of total state commitment, does indeed exist.*

*For a discussion of tentative legal theories which support the suggested alternative, and which, if ultimately accepted by the Courts, might compel its adoption, see Appendix B, infra.

END NOTES

1) A general overview of state certification laws and regulations is contained in Stinnett, A Manual On Certification for School Personnel in the United States (NEA,1970). A detailed analysis of certification standards in the State of New York is set forth in Appendix A, annexed hereto. In 26 states (but not in New York), state certification is also required of private and parochial school teachers. Ibid, p.28.

2) Lierheimer, "Changing the Palace Guard", Phi Delta Kappan, September,1970, p.20.

3) Featherstone, "Who's Fit to Teach", The New Republic, December 13,1969, p.19.

4) The discussion which follows is taken largely from Conant, The Education of American Teachers (McGraw-Hill,1963), Koerner, The Miseducation of American Teachers (Houghton Mifflin,1963), Silberman, Crisis in the Classroom (Vintage, 1971), and Olson,"The Preparation of the Teacher" in Olson et al, Education For 1984 And After (University of Nebraska, 1972).

5) Silberman, op.cit., p.417.

6) Koerner, op.cit., p.17; see also studies cited at p.36, "A 1969 Education Professions Development Act report showed that 80% of all teachers are trained at "C" and "D" rated institutions on the American Association of University Professors' scale of faculty salaries. Nearly half were attending "D" rated schools while less than 40% were attending "A" rated schools in 1969. The faculty salary scale has traditionally been one of the criteria by which the quality of an institution has been measured". Tractenberg, Testing the Teacher (Agathon,1973), p.25.

7) Conant, op.cit., p.12.

8) Koerner, op.cit., p.18. In a recent survey quoted by Olson, op.cit., at p.37, 25.2% of America's teachers rated their professional courses as"poor", but only 5.7% thought their subject matter courses "poor". See also Koerner, op.cit., Ch.IV, Conant, op.cit., Ch.6.

9) Silberman, op.cit., pp.451 ff; Oestreich, "The Professional Growth of the Student Teacher", Phi Delta Kappan, January,1974, p.335; Koerner, op.cit., pp.94-96.

10) Testimony at 1971 New York City Human Rights Commission Hearings on Equal Employment Opportunity in the Public Schools. A transcript of the hearings appears in Tractenberg, Selection of Teachers and Supervisors in Urban School Systems (Agathon,1972), (hereafter referred to as "Selection"). Mr. Shanker's statement appears on p.353. At the same hearings, a member of the New York City Board of Examiners testified that:

> "There are applicants who want to teach mathematics who don't possess the knowledge of mathematics of an average 13-year old youngster in our junior high schools....In written English, there are some amazing examples of illiteracy". (Ibid, p.141).

11) Quoted in Olson, op.cit., at 28. See also Koerner, op.cit., pp.39ff.

12) Tractenberg, Testing the Teacher, pp.25-26. It is no wonder, then, that a recent Massachussetts study found that 36% of all teachers were ill-prepared to deal effectively with the cultural and psychological differences of various types of students. Study cited in Freeman, "Training Document on Legal Issues: Part I" (S.C.U.E.E.T.,1973), p.8.

13) See e.g. studies cited in Bausell and Moody, "Are Teacher Preparatory Institutions Necessary", Phi Delta Kappan, January,1973, p.298; Broudy, "A Critique of Performance Based Teacher Education" (AACTE,1972), pp.8-9; Jencks, Inequality (Harper,1972) p.187; Koerner, op.cit., pp.64ff.

14) Tractenberg, Selection, p.609.

15) Schmieder, "Competency-Based Education: The State of the Scene" (AACTE,1973), p.viii.

16) Ibid, pp.10-11. See also Wilson and Curtis, "The States Mandate Performance-Based Teacher Education", Phi Delta Kappan, October,1973, pp.76-77.

17) Schmieder, op.cit., p.52.

18) Elam, "Performance-Based Teacher Education: "What Is the State of the Art" (AACTE,1971), pp.6-7. Elam goes on to specify certain additional "implied characteristics" of PBTE programs such as individualization and "modularization" of instruction, and other "related characteristics" such as "field-setting" and broad-based "consortia" decision-making.

19) The literature on PBTE wherein these issues are discussed is vast. My major sources are as follows: Elam, op.cit., Schmieder, op.cit., Andrews, Atlanta or Atlantis (Multi-State Consortium,1973), Houston, Strategies and Resources for Performance-Based Education (Multi-State Consortium,1973), Rosner, The Power of Competency-Based Teacher Education (Allyn & Bacon,1972), Robinson, "The Power of Competency-Based Teacher Education: Views of a Civil Rights Lawyer", PBTE standards and publications of the state education departments of New York, Texas, Washington, Minnesota, etc; Broudy, "A Critique of Performance-Based Teacher Education" (AACTE,1972), Hamilton "Competency-Based Teacher Education, (Draft Research Memorandum)", (U.S.O.E.,1973), The United Teacher, Sept.,1972 - Feb.,1974. A good overview of the PBTE debate is contained in the January,1974 issue of Phi Delta Kappan which contains more than a dozen "pro" and "con" articles on various controversial aspects of PBTE. An excellent continuing source of information on PBTE matters is provided in the PBTE newsletter published monthly by the Multi-State Consortium on PBTE, whose headquarters are in the New York State Education Department, Albany, New York.

20) In this regard, validation study research concerning PBTE, which may in some sense be viewed as an offshoot of the more general school accountability movement, is at an even more primitive stage than its parent; school level performance indicators used for many general accountability models seem to be at a more advanced level of development than are the classroom and pupil level indicators necessary for PBTE. See Wynne, The Politics of School Accountability (McCutcheon,1972); "A Design For An Accountability System For The New York City School System" (Educational Testing Service,1972).

21) An Additional problem, noted by Sandra Feldman, staff director of the United Federation of Teachers, is that in practice competency definition may merely be "old wine in new bottles" since many of the newly defined competencies appear to be restatements of basic objectives set forth in teacher training manuals over the past fifty years. See The United Teacher, December 9,1973, p.24

22) The two examples cited in this paragraph appear among the several hundred illustrations of specific "competencies" set forth in the 1973 "Florida Catalog - Teacher Competencies" available through the Multi-State Consortium. These "competencies" are currently being utilized in PBTE programs at a number of colleges. The catalog lists hundreds of separate discrete competencies, and also cross-indexes them to broader "teacher behavior" groupings.

23) In addition to organized resistance by liberal arts faculty professors, PBTE advocates are also faced with stiff opposition from other powerful groups such as teacher unions. Although they are likely to gain increased short term influence through involvement in PBTE consortia, many teacher unions fear that implementation of PBTE will ultimately result in pressures for elimination of the tenure system in favor of periodic re-certifications of experienced teachers based upon performance.

24) Texas Attorney General opinion no. H-197, January 4,1974.

25) Rosner, op.cit., p.97.

26) New York Board of Regents, 1972 "Statewide Plan for the Development of Post-Secondary Education", Unit 2, (hereinafter sometimes referred to as the "1972 Regents' Plan").

27) Ibid.

28) Competence-Based Certification Newsletter (N.Y. State Education Department), no.5, November,1973.

29) Compare New York State Assembly Bill 6842 (March 6,1973), which, if passed, would have required development of specific competencies to be put into effect state-wide within a two-year period.

30) The most critical of these issues, namely the appropriateness of universally mandating a totally new approach to teacher education and evaluation upon an inadequate data base, could conceivably prompt a law suit by PBTE detractors alleging unlawful delegation of legislative authority (see Appendix A, infra, p.60), and/or arbitrary and irrational state action (see Appendix B, infra). Note, however, that the Texas Attorney General's opinion cited at note 24 above would provide little relevant precedent for such a suit because it is based on particular Texas delegation statutes and on precisely-defined statutory limitations on the powers of the State Education Agency which do not exist in New York.

31) See e.g. "Format for Submission of Teacher Education Proposals" and "Competence-Based Certification Newsletter", no.5, November,1973.

32) For an indication of education school faculty reactions to the Regents' plan see "Upheaval in Teacher Education: The Regents Master Plan" (CUNY,1973).

33) "Competence-Based Certification Newsletter", no.5, November,1973. The original Regents' plan spoke in terms of exclusive credentialling by "performance assessment centers", but since these centers would inevitably be run by consortia dominated by the teacher colleges, the subsequent specification in the administrative directive seems a more realistic statement of the ultimate reality. Persons from out of state will, however, continue to be certified through the Interstate Certification Project Compact. See Appendix A, infra, p.61 . (Whether applicants from other states who do not maintain PBTE programs will be considered is a question that has not yet been discussed).

34) The Regents also propose, however, a liberalization of the current "fifth year" requirement in the direction of in-service or "life experience" alternatives.

35) New York State Commission on the Quality,Cost,and Financing of Elementary and Secondary Education ("The Fleischmann Commission Report"), (State Education Department, 1972), Vol.III, p.13.34. Note also that although the Regents' timetable predicts achievement of performance validation methodology by 1990, teacher colleges would be granted their exclusive credentialling jurisdiction at least a decade earlier.

36) One state education department official estimated during a recent conversation that "60% to 80%" of competencies desired of teachers would be universally relevant in every district of the state. But, assuming the validity of this off-the-cuff estimate, the remaining 20% to 40% may well include the critical attitudinal and technical abilities that make the major difference in teacher effectiveness.

37) Tractenberg, Testing the Teacher, p.98.

38) The State Education Department's "Format for Submission of Teacher Education Program Proposals" provides at p.6 that "if a preparatory program is unable to provide sufficient time and instruction to develop all of the characteristics necessary or desirable in a candidate completing the program, some of the characteristics may be used as entry criteria".

39) See Grant, "Implications for the Recruitment and Training of Minority Educators", PBTE (Multi-State Consortium Newsletter), January,1974, p.1.

40) Until 1971, the probationary period was one to three years. There is no provision under New York law for granting probationary credit for teaching experience in other districts. Some other states do explicitly grant credit for out-of-district experience. See, e.g. Minn. Stat. Ann. sec. 125.12, Fla. Stat. Ann. sec. 231.36.

41) Tractenberg, Testing the Teacher, p.29.

42) Tractenberg, Selection, p.9.

43) Ibid, p.81; Quirk, "Some Measurement Issues in Competency-Based Teacher Education", Phi Delta Kappan, January,1974, p.318. The present author's interviews with school principals, superintendents, administrators and board members in New York City and upstate districts also substantiate this conclusion. For example, statistics provided to the author by the Division of Personnel Planning of the New York City Board of Education indicate that only 56 New York City teachers received unsatisfactory evaluation ratings in the five-year period from 1961-66. Even conceding that many teachers will quit the profession on their own when they see the "handwriting on the wall", the miniscule number of negative ratings in a school system plagued by inadequate pupil performance is a statistical indication that scant attention has been given to probationary evaluations.

44) Fleischmann Commission Report, note 35, supra, Vol.III, Ch.13.

45) Statement of William E. Boyd, Chief of the Bureau of Teacher Education, at a series of regional meetings held in September and October,1973, to explain the Regents' plan.

46) Texas also permits a school board to extend a teacher's probationary period for an additional year if the board is in doubt (Texas Ed. Code sec. 13.102). Note however, that some other states have adopted a strong "no hearings, no reasons stated" approach similar to that of New York. See e.g. N.J. Stat. Ann. Title 18A 27-10, Donaldson v. Board of Education, 279 A.2d 112, (Superior Ct., N.J.,1971).

47) Compare "Rules and Regulations of the Department of Civil Service" Part 35, (1972) which apparently do not apply to school district personnel.

48) See note 43, supra. The Division of Personnel's figures on the numbers of "U" ratings given annually to New York's 50,000 - 60,000 probationary and tenured teachers in more recent years reads as follows:

1966-7	84
1967-8	86
1968-69	105 (including substitute teachers)
1969-70	75
1970-71	302
1972-72	276
1972-73	282

49) Tractenberg, Testing the Teacher, p.42.

50) Lurie, How To Change the Schools (Random House, 1970) p.122; See also, Brodwin v. Board of Education 7 Ed. Dep't. Rep.105 (1967), and Logan v. Pratella, Index No. 2660/73 (Sup.Ct.,West.Co.1973), (Appeal pending, App. Div.,2d Dep't.). An obvious additional danger of subjective supervisory ratings is indicated by recent research findings that "As a general rule, supervisors from each ethnic group gave higher average ratings to members of their own ethnic group". Campbell, "Tests are Valid for Minority Groups Too", Public Personnel Management, January-February 1973, at 73. Of course, even if a supervisor is attempting to conduct a fully fair evaluation, the lack of any valid objective standards means that his "U" rating may reflect a judgmental difference on instructional approaches or methods rather than a true indication of poor performance. An illustrative example in this regard is provided by Matter of Liebowitz 6 Ed. Dep't. Rep.81 (1967).

51) The New York City rating form, if presented to the Courts, might well be invalidated under the standards for "sufficient objectivity" enunciated by the Court of Appeals in such cases as Matter of Fink v. Finegan 270 N.Y.356 (1936) and Nelson v. Board of Examiners 21 N.Y. 2d 408 (1968).

52) Tractenberg, Testing the Teacher, p.305. See figures cited at note 48 supra. Ninety-nine probationary teachers were dismissed in New York City in 1972-73. This was the first year such data was compiled, apparently because the number was almost non-existent in prior years.

53) It is not clear whether the courts will enforce a school board's contractual commitment to grant a hearing or review procedure in the absence of statutory requirements. See Community School Board 3 v. Board of Education, Index no. 19895/72 (S. Ct. N.Y. Co., May 16,1973).

54) The few cases which have arisen since the passage of sec. 3031 indicate that many school boards have apparently been unable to provide adequate specific statements of reasons and instead have responded to teacher requests with vague statements such as "unsatisfactory service" and failure to live up to "quality of teaching expected". See e.g. Logan v. Pratella, note 50, supra, Matter of McGrath 13 Ed. Dep't. Rep.___, Comm. Dec.#8699 (Sept.10,1973). This failure to provide adequate specific grounds further substantiates the argument in the main text that at the present time evaluations and dismissals generally are not made in accordance with rational, objective standards that can be described with any degree of particularity.

55) Under Roth and the Supreme Court's companion holding in Perry v. Sindermann 408 U.S.593 (1972), a right to a hearing will also obtain if a teacher's "property" interests, (defined loosely as a written or implied contract or other "claim of entitlement") are involved. This may ultimately result in a mandatory requirement for a hearing before a teacher can be dismissed during the course of the probationary term, which arguably he is "entitled" to complete. See Connell v. Higginbotham 403 U.S. 207 (1971), Russo v. Central School District No. 1,469F. 2d 623,628, note 6, (2d Circ.,1972), Matter of Gray 41 A.D. 2d 739 (2d Dep't.,1973).

56) See e.g. Hostrop v. Board of Junior College District 471 F.2d 488,494 (7th Cir.,1972) Kennedy v. Engel 348 F.Supp.1142 (E.D. N.Y.,1972), Cookson v. Lewiston School District #1 351 F.Supp.983, 986 (D.Mont.,1972), Matter of Brown 42 A.D. 2d 708 (2d Dep't.,1973), Baranoff v. Board of Education 72 Misc. 2d 959 (S.Ct., Nassau Co.,1973), Matter of Dodell, N.Y.L.J., Feb.8,1973, p.20, Col.6 (S.Ct., Suffolk Co.), Aster v. Board of Education 72 Misc. 2d 953 (S.Ct., Kings Co.,1972), Matter of Ambrose N.Y.L.J. April 30,1973, p.19, col.4 (S.Ct., Kings Co.). Note that the question of the applicability of Roth in those of the above decisions involving New York City personnel is complicated by the stated or unstated issue as to whether sec.105-a proceedings traditionally granted to New York City teachers already meet Roth's requirements.

57) The obvious fact that a prospective employer will be reluctant to hire a teacher dismissed from another district, especially in time of teacher surplus, is exemplified by the standard application form required by New York City's

Board of Examiners. This form asks not only "Have you ever been discharged or required to resign from any position?" but also, "Have you ever resigned as an alternative to facing charges or dismissal?" An applicant is given space for providing an explanation for any such discharges, but since the reasons for a prior dismissal are normally unstated, vaguely stated or kept "confidential", his ability to provide an adequate explanation is severely circumscribed. See Matter of Amlaw 11 Ed. Dep't. Rep.243 (1972), c.f. Kennedy v. Engel 348 F. Supp. 1142, 1148 (E.D., N.Y.,1972). The Commissioner's decision in Matter of Baronet 11 Ed. Dep't. Rep.150 (1972) distinguishes license revocation proceedings from probationary dismissals in New York City on the unsubstantiated assumption that a dismissed teacher who retains his license may be re-employed by another community district. It is not clear, however, that the strict appointment procedures based on eligible list rank order required by Ed. Law sec. 2590-j would permit such hirings. In any event, other New York City districts, like other upstate districts, would not tend to hire such dismissed teachers, whether or not they retain a license or certificate, for all the reasons discussed above.

58) Cases and regulations upholding a hearing or review right thus far generally place the burden of going forward and the burden of proof entirely on the teacher, see e.g. Roth v. Board of Regents 310 F. Supp.972, 980 (W.D. Wis.,1970), aff'd. 466 F.2d 806 (7th Cir.,1971), rev'd. 408 U.S. 564 (1972), or grant a right to be heard without clarifying what level of justification is to be required for a school board dismissal decision. N.Y.C. Bd. of Ed. By-Laws sec. 105-a. Recent New York cases such as Cassner v. Board of Examiners 27 A.D. 2d 662 (2d Dep't.,1967), which upheld a candidate's right to see to the Board of Examiner's rating schedules, indicate that the Courts are likely to increasingly demand substantial justification for school board ratings. (See also, Board of Education Central School District #1 v. Welsby 37 A.D.2d 493 (4th Dep't.,1971), aff'd. 32 N.Y. 2d 660 (1973), and Tischler v. Board of Education 37 A.D. 2d 261 (2d Dep't. 1971) where the Court rejected an assertion of "boundless" board discretion in a First Amendment situation and indicated that teacher dismissals must be based upon "bona fide, legitimate reasons"). The Courts, then, apparently are rejecting the Commissioner's less stringent traditional inclination to uphold employer or examiner decisions without detailed probing of their reasons. See e.g. Matter of Fluger and Janus 4 Ed. Dep't. Rep.33 (1964), Matter of Glazer 4 Ed. Dep't. Rep.7 (1964), Matter of Sevush 7 Ed. Dep't. Rep. 130 (1968), Matter of McGrath, note 54, supra.

59) The irrationality of present credentialling laws is dramatically illustrated by the case of Board of Education v. Nyquist 31 N.Y. 2d 468 (1973) where an "acting" principal who had served in the position for ten years and was "highly praised by her superiors for her performance of a difficult job" was denied permanent appointment and tenure status because she had failed the board of examiners test. See also Ed. Law sec. 2573(1), passed in response to the Court of Appeals' decision in Mannix v. Board of Education of the City of New York 21 N.Y. 2d 455 (1968), which requires completion of all required course work before a teacher may be granted tenure.

60) Although there apparently is no performance validation research that would necessarily correlate subject matter competence at the college degree level to effective classroom performance, in an age when more than half of all high school graduates go on to college, it is unlikely that the public or the courts would easily accept elimination of this criterion. The courts have struck down high school diploma requirements for manual workers Griggs v. Duke Power Company 401 U.S. 424 (1971), United States v. Georgia Power Corporation 474 F.2d 906 (5th Cir., 1973), see also Bruckner v. Goodyear Tire and Rubber Corporation 339 F. Supp. 1108, 1124 (N.D. Ala.,1972), but they have been reluctant to do so for civil service employees such as police officers, Castro v. Beecher 334 F. Supp. 930 (D.Mass.,1971), aff'd. in part, rev'd in part, 459 F.2d 725 (1st Cir.,1972); see also Allen v, City of Mobile 331 F. Supp. 1134 (S.D. Ala.,1971), aff'd. 466 F.2d 122 (5th Cir.,1972). In one of the few decisions to date involving challenges to college diploma requirements, the United States Court of Appeals for the Tenth Circuit upheld such a standard for airline pilots, pointing out that "United officials have testified that the possession of a college degree indicated that the applicant had the ability to understand or retain concepts and information given in the atmosphere of a classroom or training program". Spurlock v. United Airlines, 475 F.2d 216, 218 (1972).

61) The original insistence that elementary school teachers possess basic competence in reading, writing and arithmetic (see p. 2 supra) is thus transposed in our more complex age to subject matter competence at the college degree level. It is instructive to note that at the turn of the century, college graduation was generally considered a fully acceptable alternative to the contemporary credentialling exams and requirements. see e.g. Kemble v. Cook 178 A.219 (S.Ct.,Md.,1935).

62) "It is possible, but it is more difficult under the present system [to discharge a probationary teacher] because the teacher comes to the school with a license granted by an authoritative body.....The principal has greater difficulty validating his objections to dismiss the teacher when the teacher comes with such a license. However, it is much easier for a principal to replace a substitute teacher who does not have a regular license...." Irving Flinker, New York City principal, quoted in Tractenberg, Selection, p.66.

63) Koerner, op.cit., pp.250-252, briefly mentioned the "speculative" possibility of granting local school boards hiring freedom analogous to that enjoyed by private schools. He dismissed the possibility, however, as being beyond serious consideration under "existing conditions". The specific focus that the PBTE debate has placed on the inadequacies of traditional credentialling, and the important legal developments discussed below in Appendix B have, however, significantly changed the "conditions" which existed in 1963.

64) This concern with "professionalism" and the adherence to the lawyer-doctor model is also evidenced by the nation-wide drive of the National Education Association to obtain passage of its model Professional Practices Act which establishes teacher review boards to set and administer credentialling requirements. Such boards have already been established in a number of states. see Stinnett, op.cit., pp.41-42.

65) For recent judicial analyses of the purposes of requirements for entry to the legal profession see Chaney v. State Bar of California 386 F. 2d 962 (9th Cir.,1967), Lombardi v. Tauro 470 F. 2d 798 (1st Cir., 1972).

66) "The contacts doctors and lawyers have with their clients are relatively episodic and may be depersonalized.....But for the teacher, depersonalization is inherently self-defeating, for the essence of elementary teaching is the teacher's communication with the multi-dimensionality of the child. Further, teaching entails all-day, every-day client contact". Olmstead et al, "Stances Teachers Take", Phi Delta Kappan, January,1974, p.330. see also, Koerner, op.cit., p.51.

67) In addition, one wonders why the more relevant example of college professors, who are not generally licensed or credentialled, is not put forward in these discussions. Advocates of teacher professionalism might better argue for elimination of bureaucratic shackles remaining from the days when the state felt a need to insure that the women administering the village schoolhouse were not total illiterates, rather than for perpetuation of an irrational credentialling approach which distinguishes them from their college-level colleagues.

68) See e.g. Kristol, "Decentralization for What?" 11 Public Interest 17, 25 (1968).

69) Jencks, op.cit., pp.193-194 (But, compare, Cooper and Sobol "Seniority and Testing Under Fair Employment Laws" 82 Harv.L.Rev. 1598, 1677 [1969]); Allen v. City of Mobile 331 F. Supp.1134, 1140 (S.D.Ala.,1971), aff'd. 466 F.2d,122 (5th Cir.,1972).

70) Indeed, a detailed proposal which entails state-wide monitoring of local evaluation standards (although with somewhat less local initiative than that argued for here) was made by Alvin Lierheimer, Assistant Commissioner for Higher Education of the New York State Education Department, in "Changing the Palace Guard", Phi Delta Kappan, September, 1970, p.20.

71) Although the New York Courts have traditionally deferred to the "expertise" of the professional credentialling authorities, in cases where a negative performance evaluation was clearly based on one man's personal judgment, they have refused to accept the result. Matter of Cohen v. Fields 298 N.Y. 235 (1948); see also Steger v. Board of Education 171 Misc. 195, 196 (Sect,N.Y. Co. 1939), aff'd. 260 A.D. 1003 (1st Dep't.,1940). There has been explicit judicial recognition of the fact that "possibility of error would be reduced if more than one examiner conducted such oral tests....." Sloat v. Board of Examiners 274 N.Y. 367,373 (1937).

72) Note that under a new New York City plan for continuing performance evaluation of supervisory personnel, the evaluation standards would be drawn up by the appointed supervisor and his immediate superior, and the ratings would be done exclusively by the immediate superior. "Principals Face Discipline Under Grading System", New York Times, January 1,1974, p.1

73) The Regents' 1972 master plan and the Department's 1971 "New Style of Certification" call for mandatory involvement of "public school representatives" and teachers in a process basically dominated by teacher training institutions, but parent, student and community input are nowhere required. The local representatives are expected to "approve" the evaluation approach to be used, but probably because the evaluations will not be oriented to specific school settings, there is no indication that they will be among the actual evaluators.

74) Chance v. Board of Examiners 330 F. Supp. 203 (S.D.,N.Y., 1971), aff'd. 458 F.2d 1167 (2d Cir.,1972). The Court's preliminary injunction invalidated the traditional board of examiners tests for principals and other supervisors and required the New York City Board of Education to devise procedures and standards for the assignment of acting supervisory personnel. (Although the board of examiners' tests were enjoined, state certification or its equivalent was continued as a minimal entry requirement). The procedures consequently promulgated in Special Circulars 42 (1971-72) and 30 (1972-73) called for development of local performance standards by community school boards, participation by parents and staff in the interviewing of applicants, and performance evaluation of acting appointees on a regular basis. Few such performance standards were actually developed, apparently because the temporary nature of the Circular 30 procedures provided little incentive to undertake the significant amount of work involved, and because of a lack of clarity as to who had the responsibility for their preparation. (The failure to clarify the role of all the participants in the evaluative stage of the process has also created much confusion and hostility. In a number of instances, parent and community groups spent months intensively interviewing and considering applications, only to find their recommendations disregarded by a community school board which cavalierly designated a candidate previously rejected by the selection panel or a total unknown. See e.g. Chancellor's decisions in P.T.A. P.S. 208-Kv. Community School Board 18, (September 2,1973), P.T.A.,J.H.S. 65 v. Community School Board 2 (July 3,1973).

Upon the basis of an agreed-upon stipulation by the plaintiffs and the board of examiners, the Chance Court in July,1973 entered a final order requiring implementation of an experimental performance evaluation system for permanent licensing of New York City supervisors. Although many innovative suggestions have been put forth by a working

committee of plaintiffs' and defendants' representatives, an operational system has yet to be implemented. Apparently, the major stumble blocks concern "local-regional issues" such as the manner in which the central board of examiners will continue to "service" the community school districts, the extent to which local rather than city-wide standards will be articulated, and the composition of the examining panels, which the board of examiners thus far has maintained may include a local community representative as a "consultant" but not as a participant in the final decision. Documents describing the above developments in detail are available from the Public Education Association, 20 W. 40th Street, New York City. See also P.E.A.'s early "Proposals for Two-Step Certification" which appear to have originated and inspired performance evaluation reforms in New York City.

75) Calif. Ed.Code sec.13485 et seq which required "The governing board of each school district [to] develop and adopt specific evaluation and assessment guidelines", including the "establishment of standards of expected student progress in each area of study". Although the law specifically calls for consultation of teachers in the development and adoption of these guidelines, teachers apparently have not in fact generally participated in such processes and the law thus far has not been fully effective. (See Education U.S.A., January 14,1974, p.103). The vagueness of the law's requirements (what is the precise teacher's role? - what is the role of other groups?), its threatening emphasis on "standards of student progress" rather than the more immediate necessity to articulate basic job descriptions, and the unclear relationship between this law and the credentialling system in general may be partial explanations for this lack of implementation.

APPENDIX "A"

AN ANALYSIS OF TEACHER CREDENTIALLING LAWS AND REGULATIONS IN THE STATE OF NEW YORK

Pursuant to the constitutional mandate that "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (N.Y. Const. Art.XI sec.1), the New York legislature has provided for the mandatory certification of all teachers in the public schools of the state.* Thus, Ed. Law sec. 3001 provides that all public school teachers must be 18 years of age and "in possession of a teacher's certificate issued under the authority of this chapter or diploma issued on the completion of a course in a state college for teachers or state teachers college of this state".

The general authority to issue certificates "under this chapter" is explicitly granted to the Commissioner of Education who "shall prescribe, subject to the approval of the regents, regulations governing the examination and

*The legislature has not extended mandatory certification requirements to non-public school teachers. Moreover, it has specifically been held that the compulsory education requirements of Ed. Law sec. 3204 can be satisfied by home instruction rendered by a mother who does not possess a teaching certificate. People v. Turner 277 App. Div. 317 (4th Dep't.,1950). The due process and equal protection implications of these differential certification standards are discussed below at p. 92 .

certification of teachers employed in all the public schools of the state" Ed. Law sec. 3004. Aside from a few very limited specific requirements such as the necessity for all teachers to have knowledge and teaching ability in the subjects of alcoholic drinks and narcotics (Ed. Law secs. 804, 804-a), the legislature has thus delegated the basic responsibility for establishing specific teacher credentialling standards to the Commissioner.* Although sec. 3001 on its face would appear to establish an independent certification authority in the state teachers' colleges, in fact the curricula and courses of study at all state teacher training institutions are subject to the direct regulation of the Commissioner (Ed.Law sec.305 [12]), who is also empowered to annul any certificates or diplomas awarded by such institutions (Ed.Law sec.305 [7]).

Unlike education agency officials in other states, the New York Commissioner is not restrained in the exercise of his credentialling discretion by a requirement that only teacher training programs first approved by private

*This broad discretion of the Commissioner could conceivably be considered an unconstitutional delegation of legislative authority under the stringent standards established by the Court of Appeals in Packer Collegiate Institute v. The University of the State of New York 298 N.Y. 184 (1948). See also Fink v. Cole 302 N.Y. 216,225 (1951), City of Utica v. Water Control Board 5 N.Y. 2d 164 (1959). Compare e.g.Fla. Stat.Ann. sec. 231.16, a statute requiring implementation of a specific credit-hour credentialling system.

accrediting agencies may receive state endorsement (see S.C.U.E.E.T., August Document, Ch.II (1972), Freeman "Training Document on Legal Issues: Part I" (S.C.U.E.E.T., 1973), p.2); furthermore, he is permitted, but not required, to recognize certificates granted by other states. (Ed. Law sec. 3007. Compare e.g. Texas Ed. Code sec. 13.042).* The Commissioner's wide powers are further underscored by the legislature's categorization of all teaching personnel in the "unclassified service", which renders them exempt from competitive examination requirements, generally mandated for civil servants by N.Y. Const. Art. V, sec. 6, and subject instead to qualifications for appointment as determined by the Commissioner. (Civ.Serv. Law sec.35).

However, special licensing procedures are established by statute for the two largest cities in the State, Buffalo and New York. (cf.Ill. Ann.Stat. ch.122, sec.21-1). In Buffalo, teacher appointments must be from ranked eligible lists established upon the basis of competitive examinations held by the superintendent. Ed.Law sec. 2573 (10-a). For

*New York is, however, a party to the Interstate Agreement on Qualifications of Educational Personnel (Ed.Law sec.3030). Under this Agreement, the Commissioner is committed to attempt to "facilitate the movement of teachers.....among the states", even though he retains the discretion to accept or reject reciprocal contracts with specific outside jurisdictions.

New York City, a special board of examiners is established to conduct examinations and prepare ranked eligible lists from which teaching appointments shall be made. Ed.Law secs. 2569, 2573 (10), 2590-j. The minimum education and experience requirements enforced by the New York City Board of Examiners are established by the Chancellor, who must ensure that these standards are "not.....less than the minimum state requirements for certification". Ed.Law sec. 2590-j.2. Thus, the special New York City licensing procedure can, aside from its mandatory examination aspect, be viewed as a statutorily-established mechanism for a locality to add its own additional certification requirements,*

*The rationale for a mandatory additional examination requirement in the large cities has never been clearly articulated. The system apparently is a hold-over from the prevailing pattern in the late nineteenth century when certification was often done by local examination. When the city-wide board of examiners was created at the turn of the century upon the merger of New York's five boroughs into a unified municipality, local examination was clearly seen as an alternative,rather than an addition, to state certification since the examination could be waived for college graduates and holders of state certificates. N.Y. Laws of 1901, ch. 466, sec.1089.

The only conceivable justification for additional statutory licensing requirements in large cities would seem to be the impersonal nature of their hiring systems. But the creation of 32 community school districts in the City of New York pursuant to Ed.Law Art.52-A destroys even this possible rationale. Hence one must conclude that serious equal protection issues are raised by continuation of board of examiner requirements in New York. If the examination system does filter for quality, upstate residents are being denied an equal right to maximal assurance of teacher competence. If, as is more likely, the examinations are irrational mechanisms which deter and screen out qualified personnel, then residents of the city would seem to have suffered inequitable treatment.

once the fundamental requirements set by the Commissioner have been met. (Other school districts in the State similarly are entitled to add local requirements. See Ed.Law secs. 3008, 2573(9), Rules of the Board of Regents sec. 7.2, Garfield v. Scribner 39 A.D. 2d 602 [2d Dep't.,1972]). The City of Buffalo appears to be the only school district in the State which under the statute is technically permitted to ignore the credentialling regulations established by the Commissioner. But Buffalo's potential ability to pursue a fully independent route is limited by the fact that in order for its licenses to be transferable to other districts (a factor of importance to potential teacher applicants), they must be "substantially equivalent" to certificates issued by the Commissioner. Comm. Regs. sec.80.2 (j).

In sum, then, the basic credentialling power for the State of New York is delegated by the legislature to the Commissioner of Education acting with the approval of the State Board of Regents. The regulations which the Commissioner has issued to govern this area establish a pattern of provisional licensure granted upon the basis of attainment of a baccalaureate degree (this degree requirement was first instituted in 1943) and completion of a minimum number of semester hours in subject areas and in

"the professional study of education".* As in about a dozen other states, a permanent certificate will be awarded after five years, only upon the completion of a masters degree program or 30 semester hours of graduate studies. Thus, for example, the basic certification requirements for elementary and junior high school teaching, Comm. Regs. sec. 80.15, read as follows:

(a) Provisional certificate -(1) Preparation.

(i) For a certificate valid for teaching in the early childhood and upper elementary grades (N-6) the candidate shall have completed a four-year program of collegiate preparation including the baccalaureate degree at a regionally accredited higher institution or a higher institution registered by the New York State Education Department; 24 semester hours in the professional study of education including six (6) semester hours of study in the teaching of reading; and a college supervised student-teaching experience. Programs registered by the New York State Education Department shall provide evidence that graduates have met the competencies for the teaching of reading promulgated by the department.

(ii) For a certificate valid for teaching in the early childhood, upper elementary grades and an

*In addition, the Commissioner (and the New York City Board of Examiners), possess the authority to inquire into an individual's moral character and medical acceptability before granting a certification or a license, although there are obvious First Amendment limitations on the exercise of the former power. See Epstein v. Board of Education of the City of New York 162 Misc. 718 (S.Ct., N.Y. Co.,1936), Adler v. Board of Education of the City of New York 342 U.S. 485, (1952), Tripp v. Board of Examiners 44 Misc. 2d 1026 (S.Ct., Kings Co.,1964). See generally, Annotation "Discretion of School Authorities to Deny to Pupils or Teachers Scholarship, Certificate, Diploma, License or Other Like Privilege" 121 A.L.R. 1471 (1939).

academic subject in the early secondary grades (N-9), the collegiate study shall include, in addition to that required in (i) the academic concentration for which the certificate is issued.

English	30 semester hours
Foreign Language	24 semester hours
General Science	36 semester hours
(This total must include collegiate-level study in at least two sciences-biology, chemistry, physics, earth science)	
Mathematics	18 semester hours
Social Studies	30 semester hours

(2) Time validity. The provisional certificate shall be valid for five years from date of issuance.

(b) Permanent certificate. The candidate shall have completed a masters degree in or related to the field of teaching service or 30 semester hours of graduate study distributed among the liberal arts, social and behavioral sciences and professional study in education. The total program of preparation shall include the preparation required for the issuance of the provisional certificate.

(c) Substitution. One year of paid full-time teaching experience on the level for which certification is sought may be accepted in lieu of the college supervised student teaching but only when such experience carries the recommendation of the employing school district administrator.

Certification requirements for teaching academic subjects on the high school level and for specialized certificates in areas such as teaching of handicapped children may vary in specifics, but the fundamental pattern of mandating a B.A. or masters degree including a specified number of hours in subject areas and in "professional studies" remains the same.

The general requirement for completion of specific numbers of hours in professional studies obviously necessitates attendance either full-time or part-time at a "professional" teacher training institution. In practice this, of course, means that most future teachers will enroll for their full four-year college experience at an institution offering the appropriate professional courses. Recognizing this reality, the Commissioner's regulations specifically provide in sec. 80.2(k) that certificates may automatically be granted to graduates of teacher training programs approved by the State Education Department.

As indicated above, the panoply of applicable laws and regulations grant the Commissioner broad powers to regulate and control the curricula of the teacher training institutions. But, in practice, as many officials of the State Education Department will concede, the state review has historically been comprised of relatively superficial evaluations of facilities, faculty background, number of library volumes and course descriptions. The Commissioner's regulations no longer specify the areas of educational theory or methods which should be included in the mandatory hours of "professional study"*(compare : Md. "Standards for Certification" secs. 617.2, 617.4; N.J. "Regulations and Standards for Certification", 6:11-8.2). In short, the

*The reading methods requirement for elementary teachers, added in 1972, is a recent exception to the general pattern.

the State Education Department has turned the responsibility for education and certification over to the teacher training institutions, apparently exercising enough general background control to deter innovation, but not enough inspired intervention to promote thorough-going improvement in program content.*

New York's delegation of basic teacher credentialling responsibility to the teacher training institutions is typical of most of the states. The inadequacy of the alternate paths to certification available for individuals who have not gone the normal teacher training route is, however, more marked in New York than in many other states. For example, at least 16 states, but not New York, have established appeals or review committees which may consider, (albeit on a narrow basis), licensing an individual on the basis of acceptable "equivalency" experience which he has demonstrated. Stinnett, A Manual on Certification Requirements for School Personnel In the United States (NEA, 1970), p.35. Many other states provide regular certification without college course work for experienced workers wishing to teach occupational subjects. (See, e.g. Calif. Ed.Code sec. 13132, Texas Ed.Code sec.13.036[b]); in New York, such individuals must complete at least a year of college courses. Comm. Regs. secs. 80.21; 80.5 (eff.

*Whether the State's new competency-based requirements (described in Section III of the main text) will actually change this pattern is yet to be determined.

September 1,1974). Important experimental credentialling programs such as that provided by Calif. Ed.Code sec.13200 which permits a small number of general B.A. degree holders who lack any experience with "professional courses" to obtain regular certification do not exist in New York.

The one specific alternative certification option which does appear in the Commissioner's regulations, that for "visiting lecturers having unusual qualifications, to supplement the regular program of instruction" in a specific subject (Comm. Regs. sec. 80.33[c]), an exception mandated by Statute (Ed. Law sec. 3006[5]), is of such limited applicability that it is rarely utilized.* (Compare the broader language of California's comparable statute (Calif. Ed.Code sec.13133) which grants a renewable credential to anyone who has "achieved eminence in a field of endeavor commonly taught.....in the public schools").

*An alternative licensing route for teachers in New York City allows the hiring of persons who have not passed the board of examiners tests, but only if such individuals have obtained state certification and acceptable scores on the National Teachers Examination. Ed.Law sec.2590-j.5. Interestingly, this exception applies only in schools which rank in the bottom 45% of all schools in the city according to comprehensive reading examinations. The validity of the New York City Board of Examiners testing requirements are inherently called into question by this statutory provision which permits individuals who are "less qualified" according to the general mandatory testing assumptions to teach in schools having the most pressing educational needs.

The New York regulations do however, contain a major exception, common to many states, which permits an "uncertified" teacher to be employed when "no certified and qualified teacher is available after extensive recruitment", Comm. Regs. sec. 80.32. The only major stipulation is that the uncertified teacher must complete six semester hours of required study each term that he is on the job.* The legal authority for the Commissioner to permit employment of uncertified personnel under a statutory scheme which mandates possession of a teacher's certificate (Ed. Law sec. 3001) and additionally provides that "unqualified" teachers may not be paid from school moneys (Ed. Law secs. 3009, 3604[7]) remains unclear. cf. Comm. Regs. sec. 80.33(d). But, the traditional wide utilization of this exception, at least before current requirements for prior approval by the State Education Department were enforced, evidences the excessive rigidity of the normative credentialling system.**

*In addition, individuals not working toward certification can be employed as substitutes for up to 40 days per term. (Comm. Regs.sec. 80.36).

**The hiring of uncertified teachers permitted by Comm. Regs. sec. 80.32 has not been applicable in New York City, although its hard-core ghetto schools, even in times of teacher surplus, have the most difficulty attracting regularly certified personnel to their staffs. This result of this anomalous situation was recently reported by one principal who was precluded from hiring eager local liberal arts graduates with specific subject area competencies, and instead was compelled to assign staff members with no background in the specific subject on an "out of license" basis (Ed. Law sec. 2573 [11]); cf. Comm.Regs. sec. 80.2[c]).

APPENDIX "B"

TENTATIVE LEGAL THEORIES SUPPORTING PROPOSED NEW CREDENTIALLING DIRECTIONS

Section V of the main text of this paper argues that until such time as PBTE or other currently unproven reforms can provide valid indications of demonstrable competence in teacher training institution graduates, state interference in the hiring of teachers should be reduced to a minimum and local school districts should be afforded complete freedom to hire any college graduate or person with equivalent subject matter proficiency. (At the same time, standards for on-the-job evaluation of probationary personnel would be stringently upgraded and enforced).

The rationale for this position, and responses to the main objections put forth by a number of educators, have been set forth in the main text. The purpose of this Appendix is to explore certain developing legal theories which support the proposed new direction, and which might provide the basis for a possible legal action to compel its adoption. It must be emphasized, however, that the legal discussion which follows is highly tentative in form; further detailed examination of the doctrines suggested would be an essential pre-requisite to actual litigation.

A - VALIDATION UNDER THE EEOC GUIDELINES

Title VII of the federal Civil Rights Act of 1964 prohibits employers from discriminatory practices in their hiring policies. Originally, employees of private educational institutions and of state and local governmental agencies, including school districts, were exempted from the protection of the Act; in 1972 however, most of these exemptions were abolished and school district employees were henceforth to be covered by the anti-discrimination mandates of the Law (42 U.S.C. secs. 2000e, 2000e-1).

Pursuant to its powers under 42 U.S.C. sec. 2000e-12, The Equal Employment Opportunity Commission has promulgated "Guidelines On Employee Selection Procedures" (29 C.F.R. Part 1607) to regulate its administration of the Act. Under these guidelines, the statutory prescription against discriminatory utilization of ability "tests" (42 U.S.C. sec. 2000e-2[h]) is defined broadly to include not only "all formal, scored, quantified or standardized techniques of assessing job suitability", but also "specific educational .....requirements" (29 C.F.R. sec. 1607.2). Thus, not only licensing examinations such as those conducted by the New York City Board of Examiners, but also general state credentialling laws which require completion of specific

professional coursework are now subject to scrutiny under the EEOC standards.*

In scrutinizing the validity of employment selection devices, the EEOC guidelines refer to two main methods of acceptable validations, namely, "criterion validity" and "content validity".** Criterion validation (also often referred to as predictive validation) refers to a demonstration that high test scores actually correlate to superior on-the-job performance, as measured by definable performance "criteria".

*Even before the 1972 amendments, many courts, although limited to general civil rights and equal protection, rather than specific Title VII, jurisdiction, nevertheless applied to local government employment practices test validation and job-relatedness concepts similar to those specified in the EEOC guidelines. See e.g. Arrington v. Massachusetts Bay Authority 306 F. Supp. 1355 (D.Mass., 1971), Chance v. Board of Examiners 330 F.Supp. 203 (S.D., N.Y., 1971), aff'd 458 F.2d 1167 (2d Cir., 1972), Fowler v. Schwarzwalder 351 F.Supp. 721, 724 (D.Minn., 1972), Harper v. Mayor and City Council of Baltimore 359 F.Supp. 1187, 1196 (D.Md., 1973). Although the courts are not legally bound to fully follow all the specifics of the EEOC guidelines in applying Title VII prescripts, the United States Supreme Court made clear in its landmark ruling in Griggs v. Duke Power Company 401 U.S. 424, 434 (1971) that since the guidelines express the Congressional intent, their thrust would be enforced. See also United States v. Georgia Power Company 474 F.2d 906, 913 (5th Cir., 1973); cf. Note "Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964" 84 Harv. L. Rev. 1109, 1128ff (1971).

**"Construct validity", referring to a correlation between specific physical or mental traits needed for a particular job and a test measuring those traits, is also mentioned in the guidelines, but this relatively esoteric category is not relevant to the present discussion.

Content validation, which is permitted by the Commission only where predictive validation is not "feasible" (29 C.F.R. sec. 1607.5[a]), refers to a demonstration that the content of a testing device appears to be clearly and directly related to the particular job under consideration.

Applying these concepts in the teacher credentialling context, "predictive validation" would be almost synonymous with the type of performance correlations which are sought by advocates of PBTE, but which New York State officials do not expect to be available until 1990 at the earliest. Hence, there can be little doubt that present teacher credentialling laws would be invalidated under a predictive validation requirement. But even if the less vigorous content validation standard is applied, present credentialling laws still appear incapable of satisfying EEOC standards. The guidelines require for content validation "sufficient information from job analyses to demonstrate the relevance of the content" and "suitable samples of the essential knowledge, skills or behavior composing the job in question" (29C.F.R. sec. 1607.5[a]). Such job analyses and acceptable job descriptions of teacher functions simply do not exist in most school districts; officials in New York and other states have turned to PBTE, despite uncertainties as to its ultimate validity, largely because emphasis on articulation

of "competencies" might, at the least, force the system to clarify and understand the precise nature of the job that the teachers should be performing. As discussed in the main text however, the regional and state-wide orientation of both present credentialling laws and the proposed PBTE reforms almost per se prevent the development of acceptable job analyses, simply because the "job" to be performed by a teacher in Scarsdale is significantly different from the "job" to be performed by a teacher in Oneonta or in Harlem.* (For judicial discussions of minimal "content validation" requirements, see Chance v. Board of Examiners 330 F.Supp.203 (S.D. N.Y.,1971) aff'd 458 F.2d 1167 (2d Cir.,1972) (school supervisors license exam invalidated), Castro v. Beecher 334 F.Supp. 930,942 (D.Mass.,1971), aff'd 459 F.2d 725 (1st Cir.,1972), (police licensing exam invalidated); Western Addiction Community Organization v. Alioto 340 F.Supp. 1351,1354-5 (N.D.Calif.,1972), (firefighters exam invalidated); Moody v. Albemarle Paper Company 474 F.2d 134,139 (4th Cir., 1973), (private industry testing procedures invalidated);

*For a discussion of the differential educational needs of particular communities and a call for "culture-specific" credentialling, see Bowman et al, The University Can't Train Teachers (S.C.U.E.E.T.,1972) and Freeman, "Some Legal Developments and Their Possible Impact on the Future of Education" (S.C.U.E.E.T.,1974).

Davis v. Washington 352 F.Supp.187 (D.C.,D.C.1972), (police sergeants' exam upheld), Allen v. City of Mobile, 331 F.Supp. 1134,1145 (S.D. Ala.,1971) aff'd 466 F.2d 122 (5th Cir.,1972), (police sergeants' exam upheld).

In short, it would appear, that application of the EEOC guidelines would invalidate both present credentialling laws and the current PBTE alternatives. In such an event, the proposal set forth in Section V above which would eliminate arbitrary entry barriers beyond basic subject matter competency while emphasizing on-the-job performance evaluations, would seem a reasonable, "job-related" alternative remedy. The catch in this equation is, however, that the EEOC guidelines will directly be applied to specific hiring practices only if there has been a showing of adverse effects* on the employment opportunities of racial, religious, sexual or ethnic minority groups.

A possible discriminatory impact of the New York City Board of Examiners test could be demonstrated by marshalling statistics comparing the percentage of minority group candidates who took the test (or of possible eligibles who were deterred) with the percentage who failed. But the workings of the general state certification laws are more subtle: since certification is largely synonymous with

*The U.S. Supreme Court's decision in Griggs, supra, made clear that discriminatory impact, even in the absence of discriminatory intent, would invalidate hiring practices under Title VII.

graduation from teacher training colleges, one would need to attempt the much more difficult task of compiling statistics showing discriminatory selection procedures and/or failure rates for minority students at these institutions; furthermore, even if data on selection and failure rates is obtainable, significant questions as to the appropriate geographical scope of the investigation (all colleges in New York State? all colleges in the United States approved for reciprocal certification purposes?) would need to be considered.

Thus, the likelihood of obtaining discriminatory impact statistics on state credentialling laws and practices appears somewhat remote. In the absence of such statistics (or if statistics were compiled which revealed that the effect of present credentialling laws is to irrationally exclude members of majority and minority groups on an "equal" basis), the EEOC guidelines could not be directly invoked. But an analysis of certain employment discrimination cases which were decided on Constitutional, rather than on Title VII grounds, indicates that it may nevertheless be possible to persuade the courts to accept jurisdiction and to invalidate present credentialling approaches, not because of any discriminatory impact but rather because of the basic irrationality of perpetuating requirements which have no demonstrable predictive or content validity.

B - THE CHANGING CONTENT OF THE "RATIONAL RELATIONSHIP" TEST

The development of Constitutional equal protection doctrines since the New Deal era has resulted in two general approaches to laws or regulations whose impact falls unequally on differing groups of citizens: in some cases such state actions will be analyzed to determine whether there is any "rational relationship" to a valid state purpose, while other such state actions will require a showing of a "compelling state interest". The state's burden in establishing a "rational relationship" is met if the means chosen are appropriate to the end sought, even if other means with less burdensome consequences for affected groups could have been devised. If the "compelling state interest" test is applied, however, the state must meet the much heavier burden of establishing that no other available legislative or administrative methods could have achieved the desired result. (For a general overview of these points, see Note, "Developments in the Law: Equal Protection" 82 Harv. L. Rev. 1065 (1969), Michaelman, "The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment", 83 Harv. L. Rev. 7 [1969]).

Historically, state actions involving "suspect" racial

classifications have been subjected to "compelling interest" scrutiny (see e.g. Korematsu v. United States 323 U.S. 214,216 [1944]; Loving v. Virginia 388 U.S. 1, 8-9 [1967]). This "active review" by the courts has also been extended to cases involving such "fundamental interests" as voting rights (see e.g. Harper v. Virginia State Board of Elections 383 U.S. 663 [1966], Dunn v. Blumstein 405 U.S. 330 [1972]), criminal procedure (see e.g. Griffin v. Illinois 351 U.S. 12 [1956]), and the Constitutional right to interstate travel (Shapiro v. Thompson 394 U.S. 618 [1969]).* An individual's right to the "liberty" to pursue a profession, however, has traditionally been subject to the more "restrained review" consistent with the lesser requirements of the "rational relationship" test. See e.g. Dent v. West Virginia 129 U.S. 114 (1889), (licensing of physicians), Graves v. Minnesota 272 U.S. 425 (1926), (licensing of dentists), Williamson v. Lee Optical Company 348 U.S. 483 (1955), (restriction on practice by opticians), Chiropractic Association of New York v. Hillboe 12 N.Y. 2d 109 (1962),

*The United States Supreme Court recently held that education is not a "fundamental interest" under the federal Constitution. San Antonio Independent School District v. Rodriguez 93 S.Ct. 1278 (1973), even though education may perhaps be so classified under some state constitutions. See Serrano v. Priest 487 P.2d 1241 (S.Ct.,Calif.,1972); but cf. Robinson v. Cahill 303 A.2d 273,282 (S.Ct.,N.J.,1973). An argument that the liberty to pursue a profession should be deemed a "fundamental interest" was rejected by the Court in Lombardi v. Tauro 470 F.2d 798,800-801 (1st Cir.,1972).

(restriction on practice by chiropractors).

The critical importance of the distinction between "active" and "restrained", judicial review is illustrated by the fact that the key issue in many constitutional cases is whether the plaintiff's situation does or does not involve "suspect racial classifications"or "fundamental interests"; it is often virtually conceded that if a court applies the "compelling state interest" test the plaintiff will win, whereas a plaintiff whose case is relegated to "rational relationship" status is considered likely to lose. See e.g. San Antonio Independent School District v. Rodriguez 93 S.Ct. 1278, 1287-8 (1973).

Because the Constitutional, public sector employment-testing cases which have arisen in recent years have generally required an initial showing of discriminatory impact upon minority groups (see e.g. Penn v. Stumpf 308 F. Supp. 1238 (N.D., Calif., 1970), one might have expected uniform application of the "compelling state interest" standard which, as indicated above, is typically applied to cases involving state actions with racially discriminatory impacts. Although many federal courts have applied the traditional "compelling state interest" test in this context (see e.g. Arrington v. Massachusetts Bay Transportation Authority, 306 F.Supp.1355 (D.Mass.,1971), Baker v. Columbus Municipal School District 329 F. Supp.706 (N.D.,Miss.,1971),

aff'd 462 F.2d 1112 [5th Cir.,1972]), others have hesitated to invoke the active review standard. Their reluctance appears to stem from the realization that most of these cases involve discriminatory impacts which are not necessarily accompanied by discriminatory intentions. Under these circumstances, some courts are unwilling to impose the "compelling state interest" test which, in this context, would normally require full criterion validation as a less burdensome alternative form of state action.* Accordingly, these courts have accepted content validation as the acceptable guideline and "rational relationship" as the governing constitutional standard, even though the degree of scrutiny involved in these cases far surpasses the judicial deference to governmental actions traditional to "rational relationship" situations.

Illustrative of this point is Armstead v. Starkville Municipal Separate School District 325 F. Supp.560 (W.D.,Miss.1971)

*As noted above, the EEOC guidelines specifically require criterion validation where "feasible" and, in fact go further in stressing that even if a test is criterion-validated, the employer still must show that other alternative hiring procedures are not available, 29 C.F.R. sec.1607.3. See Blumrosen, "Strangers in Paradise" 71 Mich.L.Rev. 59,84 (1972). Since passage of the 1972 amendments, this higher standard may well be required of all public employers, although one notes that in generally endorsing the EEOC guidelines, the U.S. Supreme Court in Griggs, supra, spoke in terms of "demonstrable" correlations between a test and the job in question, without specifying whether a content validation would be acceptably "demonstrable" even in situations where criterion validation would be possible.

aff'd 461 F.2d 276 (5th Cir.,1972), a case involving a southern school district which had adopted a hiring policy requiring a minimum score on the Graduate Record Examination (GRE) for initial appointment or retention of faculty positions. Although the GRE requirement had a heavy differential impact on black teachers, the Appeals Court specifically expressed its reluctance to endorse the District Court's invocation of the "compelling state interest" standard. Instead, it decided to affirm on the basis of the "rational relationship" test:

> "Nor do we need to decide what justification would be necessary to overcome any racial classification that might be found because the GRE score requirement does not measure up to the equal protection requirements under the Fourteenth Amendment i.e. it is not reasonably related to the purpose for which it was designed". (461 F.2d at 279).
>
> "It was undisputed that the GRE was not designed to and could not measure the competency of a teacher or even indicate future teacher effectiveness. However, it was established that the cut-off score would eliminate some good teachers. Consequently, we find that it has no reasonable function in the teacher selection process". (461 F.2d at 280).

Similarly, in Chance v. Board of Examiners, supra, a case involving the complex testing devices for school supervisors administered by the New York City Board of Examiners, the District Court Judge, citing a number of classical "compelling state interest" cases, held the

defendants to "a strong showing requirement" (330 F.Supp. at 216). The Appeals Court, stating its hesitancy to apply the "compelling state interest" test to a situation involving defacto, as contrasted with intentional, discrimination, specifically affirmed the District Court's ruling under "the more lenient equal protection standard":

> "[The lower] court's actual analysis indicates that it never reached the point where application of [the "compelling state interest"] test would bring a different result from application of the rational relationship test.....In short, the present examinations were not found to be job-related and thus are wholly irrelevant to the achievement of a valid state objective". (458 F.2d at 1177).

Thus, in both Armstead and Chance, the thrust of the EEOC content validation guidelines were fully applied, and employment testing procedures were invalidated, even under the "more lenient" rational relationship standard. In short, the"rational relationship" test has apparently been re-vitalized in the employment testing context. A number of other courts which were similarly troubled by this burden of proof issue have attempted to create a new compromise concept somewhere between "rational relationship" and "compelling state interest". (See e.g. Castro v. Beecher 459 F. 2d 725, 733 (1st Cir.,1972), Bridgeport Guardians,Inc. v. Bridgeport Civil Service Commission 354 F.Supp.778,787 (D.,Conn.,1973), mod.482 F.2d 1333 (2d Cir.,1973). But the important point for our purposes is that if the courts are thus willing to apply the thrust

of the EEOC content validation requirements under the "rational relationship" heading (or under a new standard "somewhere between compelling interest and rational relationship", Bridgeport Guardians, supra at 788), future attempts to seek judicial scrutiny of licensing or credentialling practices may not need to rely on an initial showing of racial discrimination.

Of course, the factual setting of discriminatory impact in Armstead, Chance, Bridgeport, etc. was a strong motivating factor in the courts' stringent scrutiny of content validity. But once it is accepted that the thrust of the EEOC validation criteria can be applied under the rubric of the "rational relationship" test, the inadequacies of present credentialling laws as described in the main text would appear to provide ample justification for similar scrutiny, even in the absence of a demonstrably discriminatory fact situation. The possibilities,as well as some of the potential problems, involved in basing a legal challenge to present credentialling laws on the "rational relationship" employment testing cases are illustrated by analysis of two Southern cases involving the National Teachers Examination (NTE). In both Baker v. Columbus Municipal School District 329 F. Supp.706 (N.D., Miss.,1971), aff'd 462 F.2d 1112 (5th Cir.,1972) and United States v. Nansemond County School Board 351 F. Supp.196 (E.D.,Va.,1972), (appeal pending,4th Cir.),

the rational relationship of the NTE to legitimate state interests was explicated at length, although with markedly different results*

The Court in Baker held that "apart from its discriminatory aspects, the NTE cut-off score requirement is an arbitrary and unreasonable qualification for re-employment and employment as a teacher" on both due process and equal protection gounds. The Court pointed out that the NTE, which tests both "general professional preparation" and particular "teaching area" knowledge, has never been tested for predictive validation. Nor did the Court believe that the examination as used by the defendants as a teacher selection device could meet standards similar to those set by the EEOC for content validation.

Representatives of the Educational Testing Service, the creators of the NTE, testified that the purpose of the exam was to measure the academic achievement of college seniors completing four years of teacher education. It was thus designed to reflect teacher training institution course content, but was not derived from, or correlated to, job descriptions of any actual teaching positions in the Columbus school district. The Court specifically pointed out that the "NTE measures only a fraction of the characteristics required for effective classroom performance".

*In both cases the additional implications and additional burdens of proof required by alleged discriminatory racial impacts were also considered.

More particularly, it was noted that the NTE tests only four of 25 characteristics used for in-service evaluations in that district.

Applying these findings to the current teacher credentialling laws, one could similarly assert that present credentialling standards, like the NTE, reflect college course content rather than the actual performance roles of teachers in the classroom. An exclusion from teaching eligibility of those lacking one, two or 36 hours of specific professional courses is no less an arbitrary "cut-off" than a minimum test score on the NTE. Furthermore, even if the New York State PBTE approach is fully implemented, there is no assurance of an acceptable level of correlation between successful demonstration of competencies approved by the regional consortium and competencies actually relevant in any particular district.

The Court in Nansemond, faced with the same basic arguments against the NTE, agreed that predictive validation was not shown, but upheld the exam on content validation grounds. The judge, reasoning that since evidence at the trial indicated that testable "knowledge makes up at least 25% to 30% of composite teaching behavior", held that the examination is reasonably related to the job. Alluding specifically to Baker, the Court went so far as to say that

content validation of even one of 25 characteristics may be acceptable under the reasonable relationship standard if that one characteristic is "substantially involved in the successful performance of the job".

The specifics of the position articulated by the Court in Nansemond appear unlikely to gain widespread judicial endorsement. In the first place, it does not appear that content validation of one of 25 criteria would be generally viewed as a reasonable basis for upholding examination or credentialling regulations.* If one can postulate a candidate scoring 99% by a hypothetical measure in 24 teaching competencies important to a particular school district, but failing an examination (or course requirement) in one additional area, few judges could be expected to endorse the view that he should be excluded from consideration. In the second place, the Court's reference to the 25% to 30% knowledge component, gave no indication that the "knowledge" tested by the NTE is the same "knowledge" applicable to the needs of any particular school district.

The more serious problem posed by the decision in

*Use of the NTE as one, but not an exclusive, measure of teacher competence has been specifically permitted by the same Court which affirmed Baker. Lee v. Macon County Board of Education 463 F.2d 1174 (5th Cir.,1972).

Nansemond, however, was the judge's underlying predilection to uphold the NTE because it appeared to him, for all its inadequacies, to be the best testing device available under present circumstances. The Court specifically stated that "no test currently measures [job-relatedness] nor is it likely that any test could be developed to accomplish this goal". However, an attack on credentialling laws which was able to convince a judge that an injunction against the present inadequate system would directly result in improved methods of ensuring teacher competency, rather than in "sacrificing the children", might be viewed in an entirely different light. Thus, the question of remedies, and inclusion of specific alternative proposals such as those presented in Section I of this paper, could prove critical in any credentialling law suit.

C - PARALLEL DUE PROCESS ARGUMENTS

A challenge to teacher credentialling laws based on the precedent of the equal protection employment testing cases might also be bolstered by presentation to the courts of parallel arguments stated in terms of the substantive due process standards historically applied to professional licensing situations. (The "arbitrary and capricious" state

action test applied under the due process heading is in practice virtually synonymous with the "rational relationship" test applied when an equal protection standard is invoked. See Michaelman, op.cit. at 37).

Under the Fifth and Fourteenth Amendments of the United States Constitution, all persons are safeguarded against deprivation of "life, liberty and property, without due process of law". It has long been held that "the right of the individual....to engage in any of the common occupations of life" is encompassed in the concept of "liberty" protected by the Fourteenth Amendment, Meyer v. Nebraska 262 U.S. 390,399, (1923) and that the "right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure". Traux v. Raich 239 U.S. 33, 41 (1915).

But despite the breadth of these general statements, the court historically has protected access to an occupation only when flagrant, specific injuries were perpetrated on individuals by government actions. See e.g. United States v. Lovett 328 U.S. 303 (1946), Schware v. Board of Examiners 353 U.S. 232 (1957), Slochower v. Board of Higher Education 350 U.S. 551 (1956), Keyishian v. Board of Regents 385 U.S. 589 (1967). More broad-based attacks on licensing or

credentialling laws have repeatedly been rejected because of a judicial assumption that the "general welfare" will best be served by subordinating a small group's assertion of an untrammeled right to pursue its profession to the general public's greater right to be protected against "the consequences of ignorance and incapacity as well as deception and fraud" Dent v. West Virginia 129 U.S. 114,122 (1888). But if it can be shown that teacher credentialling laws purportedly enacted to protect the public's interest "against ignorance" in fact are having the opposite effect and are "arbitrarily and capriciously" impeding needed improvement in the schools, would not the court reconsider its traditional subordination of constitutional "liberty" rights?

Research has revealed that long before development of the EEOC standards, the United States Supreme Court, when presented with a highly analogous factual situation, invalidated an employment restriction statute on due process grounds. The provision at issue in Smith v. State of Texas 233 U.S. 630 (1914) held it to be unlawful for anyone lacking two years experience as a brakeman or conductor to conduct a freight train. The Court emphasized the importance of not imposing "unnecessary restrictions on lawful occupations" and held that:

> "A statute which permits the brakeman to act - because he is presumptively competent - and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent is not confined to securing the public safety but denies to many the liberty of contract granted to brakemen....." (233 U.S. at 641).

One might persuasively argue on the Smith analogy that present teacher credentialling laws grant exclusive entry to teacher college graduates without permitting B.A. generalists and others with equivalent proficiency to affirmatively prove they are "likewise competent". Although a professional school experience may be a vital and meaningful credential to assure the public against incompetence in doctors or lawyers (see Rosner v. Civil Service Commission 66 Misc. 2d 851 (S.Ct.,Albany Co.,1971), aff'd 38 A.D. 2d 628(3rd Dep't.,1971), National Psychological Association v. University of the State of New York 8 N.Y. 2d 197 (1960), Lombardi v. Tauro 470 F.2d 798 (1st Cir.,1972); but cf. Cowen v. Reavy 283 N.Y. 232 [1940]), the public's interest in protection against "ignorant" teachers is reasonably satisfied by a subject matter proficiency requirement. All who possess such subject matter proficiency, like the plaintiffs in Smith, should be accorded an equal opportunity to "affirmatively prove they are competent" in instructional techniques.

It is relevant to note in this context that Art.V sec. 6 of the New York State Constitution,* mandates that all civil service appointments be made on the basis of merit and fitness, but specifies that merit and fitness should be determined by competitive examination only "where practicable". Similarly, one might argue that the due process clause should be interpreted to permit state credentialling restrictions on employment opportunities only where "practicable" indicators of relevant ability are the foundation of the system. Until such time as adequate validation of credentialling standards is available, the state cannot arbitrarily impose "professional" requirements beyond subject matter competency.

*A due process challenge to credentialling laws brought in New York might also cite the interesting precedents in Mannix v. Board of Education 21 N.Y. 2d 455 (1968), where the Court of Appeals subordinated the Commissioner's 30-graduate credits requirement for permanent certification to the tenure statutes and indicated at 451 that failure to meet the permanent certification prerequisites did not necessarily reflect on one's "competency to teach", and Parolisi v. Board of Education 55 Misc. 2d 546 (S.Ct., Kings Co.,1967), where a medical prerequisite to teacher licensing was specifically held to be "arbitrary and capricious".

D - ADDITIONAL LEGAL PERSPECTIVES OF NON-TEACHER PLAINTIFFS

The discussion concerning possible legal challenges to teacher credentialling laws has thus far been premised on the assumption that the likely plaintiff in such a suit would be a teaching candidate who was denied the right to be considered for a school position because of his failure to possess requisite teacher credentials. However, it is clear that parents and students have a direct interest in the caliber of the teaching staffs in their schools,* an interest which may also entitle them to standing in such a suit. See Pierce v. Society of Sisters 268 U.S. 510 (1925), Wisconsin v. Yoder 406 U.S. 205 (1972), In re Skipworth 14 Misc.2d 325 (Dom.Rels.Ct.,N.Y.Co.1968); also, Lau v. Nicols 42 U.S.L.W. 4165 (1974), Hunnicutt v. Burge 356 F. Supp.1227 (M.D., Ga.,1973). Such parental or student plaintiffs could raise important additional legal arguments, not available to would-be teacher plaintiffs.

The first of these would be an equal protection challenge based upon the fact that present credentialling laws apply only to public school teachers in New York, but not to private or parochial school students. Parents who

*See Hopkins, "Basic Issues in New York State on Teacher Certification, Preliminary Version" (S.C.U.F.E.T.,1973), for a more detailed discussion of these interests.

cannot afford private school tuition could allege discriminatory treatment under a statutory scheme which restricts their ability and that of their school board representatives to select teachers from the wider pool of teacher applicants which is available to private school authorities. (In due process terms, questions might be raised as to how teacher credentialling laws can be justified in terms of protecting the 'general welfare' when the state's actions indicate that, at best, only a portion of the population is in need of such protection).

The second line of attack which could arise from a parental or student perspective would be an assertion of a right to meaningful educational opportunity related to the child's particular needs. The United States Supreme Court in Pierce, supra, spoke out against state attempts to "standardize" the education of children by foreclosing the option of private school instruction. Such "standardization" was again and more recently rejected in Lau, where the Court granted relief to Chinese-speaking youngsters who had been denied the provision of adequate bi-lingual education*.

*Note, however, that the Lau decision was specifically based on statutory,rather than equal protection grounds. See Arons et al "The Public Schools and the First Amendment-A Proposal for Structural Reform" (Harvard Center for Law and Education,1971), for a discussion of additional First and Fourteenth Amendment cases that might be cited to support a parental-student right to a "non-standardized" education.

Present credentialling requirements and proposed PBTE reforms which force local school districts to hire only teachers who have been credentialled in accordance with regional or state-wide standards, rather than on the basis of particular local needs, might similarly be challenged on standardization grounds.

Recent legal developments in the New York courts might provide further support for an argument alleging a right to meaningful, non-standardized equal educational opportunity. It has been specifically held in a case involving handicapped children that under the New York State Constitutional provision guaranteeing a free public school system (Art.XI,sec.1):

> "The burden is therefore on the State to assure that the educational program provided each child is appropriate to his needs". Matter of Downey 72 Misc. 2d 772 (Fam.Ct.,N.Y. Co.,1973).

Of even more direct relevance to the present situation is the Court of Appeals' reasoning in Council of Supervisory Associations v. Board of Education 23 N.Y. 2d 458 (1969). There the Court upheld the New York City Board of Education's creation of a new category of "Principal Demonstration Elementary School" and permitted it to hire applicants outside the regular elementary school principal eligible list, pending creation of a special board of examiners test for this position. The Court stated that:

> "If an educational problem be concerned with a failure to reach an ethnic group, it can scarcely be imagined that the Board of Education, in creating a school position to deal with this problem, would not require special experience with the ethnic group for essential qualifications". (23 N.Y.2d at 467).

The special qualifications upheld by the Court in C.S.A. illustrate the type of local, community-oriented "competencies" called for in the main text of this paper. They included "knowledge and relationship with disadvantaged communities, the cultural level there, the means and methods of securing increased parent involvement, the ability to stimulate them and the community to engage in a broader based education project". 23 N.Y. 2d at 467-8. Although the Court assumed the continuing validity of general state credentialling requirements in addition to the specific local competencies, the case remains an important precedent indicating explicit judicial recognition of differential community needs in licensing standards.

At the height of the demonstration district controversy which occasioned the C.S.A. case, New York City community control advocates devised ingenious equal protection theories which argued that decentralization of urban school systems was constitutionally mandated because city-wide school boards, in attempting to treat all children in the same fashion, invariably benefit middle class, but not ghetto

constituencies. See Kirp, "Community Control,Public Policy and the Limits of Law" 68 Mich. L. Rev. 1355,1376 (1970). Such arguments were rejected, however, in Oliver v. Donovan 293 F. Supp.958 (E.D., N.Y.,1968) where the Court held inter alia that the plaintiffs were unable to show any acts of the city school board which could be held to have created or perpetuated the learning deficiencies of children in the ghetto communities.

Plaintiff's theories in Oliver, although perhaps not fully plausible as an argument for constitutionally-mandated decentralization, take on new significance when applied in the teacher credentialling context. Enforcement of irrational teacher credentialling laws which deny ghetto communities the full ability to hire creative teachers sensitive to their needs could be cited as specific, discriminatory state action. If discriminatory impact could be shown by proving that teachers currently working in ghetto communities are less capable of meeting local performance needs than teachers in middle class communities, the likelihood of rigorous judicial scrutiny of present credentialling laws, whether under the "compelling state interest" or the re-vitalized "rational relationship" rubric, would be enhanced. Of equal importance is the

fact that presentation of a credentialling challenge from such a community perspective might ensure that any ultimate relief ordered by a court would take full cognizance of the need to fashion a credentialling system that is directly responsive to local needs.